

***United States Court of Appeals
for the Second Circuit***



**BRIEF FOR
APPELLANT**

74-1550

B

To be argued by
NANCY ROSNER

P/S

United States Court of Appeals
FOR THE SECOND CIRCUIT
Docket No. 74-1550

UNITED STATES OF AMERICA,

Appellee,

—v.—

CARMINE TRAMUNTI, LOUIS INGLESE, DONATO
CHRISTIANO, JOSEPH CERIALE, et al.,
Appellants.

BRIEF FOR APPELLANTS INGLESE, CHRISTIANO
and CERIALE

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UNITED STATES OF AMERICA, :
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 CHRISTIANO, JOSEPH CERIALE, et al., :
 :
 Appellants. :
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BRIEF FOR APPELLANTS INGLESE,
CHRISTIANO AND CERIALE

Appellants Louis Inglese, Donato Christiano and Joseph Ceriale appeal from judgments of conviction rendered against them in the United States District Court for the Southern District of New York on May 9, 1974 (Ceriale), and May 28, 1974 (Inglese and Christiano).

Indictment S73 Cr. 1099 charged 32 defendants with conspiracy (Count 1) and substantive counts from January 1, 1969 up to the date of the filing of the indictment, December 6, 1973, in violation of both the old and new narcotics laws.

Appellant Inglese was also charged with maintaining "a continuing criminal enterprise" (Count 2) and with 13 substantive counts (Nos. 3, 4, 5, 6, 8, 11, 12, 13, 14, 23, 24, 27 and 28). Appellant Christiano was charged with three substantive counts (Nos. 11, 12 and 18), and appellant Ceriale was also charged in three substantive counts (Nos. 23, 24 and 27).

Inglese, Christiano and Ceriale were tried jointly with 15 other defendants in the United States District Court for the Southern District of New York (Duffy, J., and a jury). The defendants were convicted, with the exception of Marchese, who was granted a directed verdict under Rule 29, and to Tolopka, who was granted a mistrial after the jury failed to reach a verdict.

Inglese, Christiano, Ceriale and 13 other defendants were convicted under the conspiracy count. Inglese was also convicted on 12 substantive counts. The "continuing criminal enterprise" charge (Count 2) was severed and Substantive Count 27 was dismissed by the court against all defendants named therein.

Inglese received consecutive sentences totaling 40 years, which were ordered to run consecutively with sentences totaling 16-1/2 years which Inglese had been sentenced to in two previous convictions.

Christiano, in addition to his conviction under the conspiracy count, was convicted on Counts 11, 12 and 13 of the indictment. He received concurrent sentences totaling 10 years.

Ceriale, also convicted of conspiracy, was found guilty under Counts 23 and 24. He received concurrent sentences totaling three years imprisonment.

Appellants Inglese and Christiano are presently incarcerated. Ceriale is free on bail.

STATEMENT OF FACTS

The government's first witness, Primrose Cadman, testified in support of the conspiracy count and Counts 3, 4, 5 and 6. She stated that she had come to the United States from England and became addicted to narcotics in 1968 (102-3).^{*} She supported her habit by stealing and reselling expensive clothing from Manhattan department stores. In May 1969 she approached the appellant Inglese (whom she already knew) while she was selling stolen clothing in Diane's Bar located on Second Avenue in Manhattan. No narcotics were discussed but Inglese, she said, bought some clothes from her (107). In June 1969 she testified that she asked Inglese to lend her \$20 so she could buy a fix of heroin. Inglese allegedly agreed in return for a promise from Cadman that she would sell clothes exclusively to Inglese. Rather than give her the \$20, however, Inglese walked away from her and had a conversation with the defendant Delvecchio (105-110), which she did not hear. Delvecchio then went to the rear of Diane's Bar, came back and called Cadman over. Delvecchio then gave her a two-inch by two-inch envelope of heroin (112, 196-7) (Count 3). She then left the bar, Inglese reminding her as she left of their agreement. She proceeded to the apartment of her boyfriend where the two injected the heroin (114). The following night Cadman paid Inglese \$20 for the heroin he

* All references in parentheses, unless otherwise indicated, refer to the transcript of trial comprising the joint appendix of appellants.

had given her the night before (115). At this time Inglese also bought \$300 worth of clothes from Cadman and sold her a half ounce of cut heroin for \$150 (117-18) (Count 4). The heroin was handed to Cadman by Delvecchio who had obtained it from the rear of the bar.

Cadman testified that in total, during the summer of 1969, after the two transactions comprising Counts 3 and 4, she received heroin "not more than 10 times." (123). Finally, Cadman explained how a person would inject heroin and testified that mannite could be used as a cutting substance (171).

Sergeant Martin O'Boyle of the Narcotics Division of the New York City Police Department testified to the facts surrounding the arrest and debriefing of one of the government's two chief co-conspirator witnesses, Frank Stassi.

O'Boyle arrested Stassi on May 22, 1973 as Stassi was leaving the building in which the defendant Mary Jane Salvani* had her apartment (219). At the time of his arrest Stassi had in his possession a large cardboard box (220) which at a later inspection (222) was found to contain mannite, a mask, strainers and a scale, as well as various other items used in the preparation and cutting of heroin.

The predicate for the May 22 arrest of Stassi was that he had sold narcotics to an undercover agent, Albert Cassella, who had been introduced to him by the other main co-conspirator witness, John Barnaba. Stassi was arrested at mid-

* Salvani was severed from trial during the jury selection.

afternoon and taken directly to the office of Frank Rogers, Special Narcotics Prosecutor for the City of New York, where, after hours of interrogation, he agreed to cooperate (221).* As a result of his agreement to cooperate with law enforcement authorities, the box of narcotics cutting paraphernalia was returned to Stassi and he was released about midnight on May 22, 1973 (241).

No fingerprints of any defendant were found on the materials inside the box (261).

Frank Stassi, the government's first major co-conspirator witness, testified that he had been a life-long resident of East Harlem and the Bronx and that he was employed, in return for tips, as a steward at the Beach Rose Social Club (270, 273, 591). Stassi testified that as a result of his employment at the club he knew the appellant Inglese, allegedly the club's proprietor. He also met the appellant Christiano, another steward at the club, and the defendant Delvecchio (282-3).

The contents of the box which he had in the trunk of his car on the afternoon of his arrest were, he stated, for narcotics cutting (276-80) and he testified that he and Delvecchio had obtained the scale, strainers and sealing machine contained in the box (304).

* Tape recordings, which were later reduced to transcript form by the defense, were made of the debriefings of Stassi, Barnaba and the other government co-conspirator witnesses (250-53).

In or around the middle or end of 1970 Inglese asked Stassi to assist Delvecchio in cutting and packaging a quantity of heroin (285-7). Three evenings later Stassi traveled by car with Delvecchio to the latter's home in Bloomfield, New Jersey where Delvecchio instructed Stassi in the methods of cutting heroin (287-92). That evening they cut three kilograms of heroin into twelve half-kilogram quantities, using mannite as the dilutant (289-91). The 12 halves were placed in a suitcase and left at the house (292). Following the cutting session Delvecchio dropped Stassi at a diner, announced that he was "going to see his man" (293), and said he would return to the diner to pick up Stassi. About 45 minutes later Delvecchio returned and the two drove to New York City to look for the appellant Inglese (293). Inglese, who was at the bar in the Blue Lounge, then spoke with Delvecchio out of the hearing of Stassi (294). Delvecchio then left, and Stassi and Inglese had a drink. For his work that evening Stassi received \$100 from Inglese (294).

This scenario, with Stassi participating in the cutting and packaging of narcotics at the direction of Inglese and Delvecchio, occurred approximately eight times during the next 2-1/2 years (295).

Three months after the first cutting session Stassi and the appellant Christiano joined Delvecchio at a second mixing session where the trio cut another three kilos into 12 halves. Upon returning to New York from New Jersey Stassi again met Inglese in the Blue Lounge. They were later joined by

Delvecchio and Christiano. Stassi was not paid for this cutting session (296-303).

Following this second session Stassi was asked by Inglese to make his apartment available for cutting and storing narcotics. Stassi agreed and Delvecchio and Stassi bought the implements later found by Sgt. O'Boyle in the cardboard box Stassi had in his possession when arrested (304). These items were stored in Stassi's kitchen in his apartment on Vincent Avenue in the Bronx (305).

A few days after the purchase of these materials, Stassi was instructed by Inglese to buy mannite from a man on Pleasant Avenue in Manhattan known as "Joe Red." Stassi identified the appellant Ceriale as Joe Red (308-9). Stassi stated that Inglese told him he could find Joe Red in the barbershop on Pleasant Avenue. Stassi went to the barbershop, spoke to Joe Red and arrangements were made to buy mannite the next day. That day Stassi drove to the barbershop and gave Joe Red the keys to his car. An hour later Joe Red returned to the barbershop and gave Stassi back the keys. Stassi returned to his apartment and removed the mannite from the trunk of the car and brought it into his apartment (308).

These trips to the Pleasant Avenue barbershop for the purpose of procuring mannite at Inglese's behest were alleged by Stassi to have occurred on a number of other occasions (308, 320-1, 331, 340-1). Following the purchase of the mannite Stassi, in the company of Delvecchio (310, 316, 321, 335, 337, 342),

would mix the heroin and mannite and bag it. These sessions occurred either at Delvecchio's home in New Jersey or Stassi's apartment on Vincent Avenue.

Following one of the mixing sessions at which 12 half kilograms were converted from three kilos, Delvecchio instructed Stassi to keep two half kilos in his apartment (312). The following day Inglese approached Stassi in the Beach Rose Social Club and instructed him to bring to the club one of the half kilo packages which Stassi had kept (313). Stassi did so and left the package on a table in the kitchen in the rear of the club. John Barnaba then entered the kitchen and Stassi observed him leave the club after Barnaba placed the package under his jacket (314). Stassi testified that he had known Barnaba for some time and that they had grown up together on Pleasant Avenue (314).

The same night of the Barnaba transfer, Inglese instructed Stassi to return home and bring the remaining half kilo to the club. Stassi testified that he did as he was instructed and returned to the club and, as before, left the package on the table in the club's kitchen (315). Stassi testified he then observed the defendant Joseph Marchese put the package under his arm and leave the club (316).^{*} Similar sales to Marchese and Barnaba occurred a few months later (324-26).

Following these Barnaba and Marchese transactions the appellant Inglese came to believe, correctly, that an eaves-

^{*} Marchese's motion for a judgment of acquittal pursuant to Fed.R.Crim.P. 29 was granted at the close of the government's case.

dropping device had been placed in the Beach Rose Social Club and that it was under observation by law enforcement authorities (327-8). Consequently, the club was closed and the habitues of the club began to frequent LoPiccolo's, an espresso shop on Roberts and Westchester Avenues in the Bronx.

Present at LoPiccolo's on a daily basis according to Stassi were not only the Beach Rose Social Club crowd but also Carmine Tramunti (330) and Thomas "Moe" Lentini. Following the move to the LoPiccolo, Stassi continued to procure mannite from Joe Red (332) and assist Delvecchio in cutting heroin (335, 338-39) and, on a few occasions, helped count money in the basement of Inglese's home (373, 376); sometimes with Christiano and Delvecchio present. For his work counting money and diluting narcotics Stassi received \$2,000 (375).

Stassi also testified that at Inglese's request, the defendant Pellegrino changed small bills for large ones at a local bank (377-8). Stassi also alleged that he overheard a conversation between the appellant Inglese and Tramunti at LoPiccolo during which Inglese told Tramunti that he [Inglese] was expecting some goods and that he would need some money (384).

Stassi also testified that in early 1973 he, Carmine Tramunti and Vincent DiNapoli, brother of the appellant Joseph DiNapoli, went to the Tear Drops Bonsoir, a Bronx nightclub. At this time Tramunti was alleged to have expressed concern that there was "nothing happening in the club" because Inglese was incarcerated on a drunken driving charge (385). Stassi also

testified about conversations Inglese had with Tramunti regarding their attempts to assist the defendant Lentini in raising bail in a separate case in which he had been arrested (395-9). Lentini was subsequently released and Stassi testified that Lentini directed him to go to the Pelham Log Cabin (399). Stassi did; present were Inglese, Christiano and co-defendant Jack Spada and another person. Spada and Stassi entered the men's room, whereupon Spada gave Stassi a half kilogram of cocaine which Spada said was for Moe Lentini. From the half kilo, Stassi said Inglese received one-eighth of a kilogram, Spada two and Stassi took the remaining eighths and stored them in a closet in the apartment of the defendant Mary Jane Salvani (402).

At one time Stassi attempted to sell the remaining portion of cocaine to the defendant Vincent D'Amico in the Centaur Bar (406). Stassi also testified that he arranged a sale of a quarter kilogram of heroin to D'Amico for \$7,000, which he then procured from the defendant George Toutoian at the Pelham Log Cabin (407-9).

Some time after July 1973 Stassi met Lentini at the Barone Bar on Pleasant Avenue. Lentini instructed Stassi to bring him the remaining eighth of cocaine that Stassi had hidden at Mary Jane Salvani's apartment (427). Stassi, who by this time was cooperating, had informed the police and was wired with a hidden transmitter. The transmitter, however, malfunctioned (1198-99) but Stassi's transfer of the cocaine to Lentini later that night (427, 1200) was observed by the officers. Lentini's customer for the cocaine was Dominick Lessa (428).

That evening, following the Lentini-Lessa transaction, Stassi went to the Centaur Bar (429) and attempted unsuccessfully to arrange a sale of a quantity of cocaine to Vincent D'Amico (430).

Subsequently, in mid-July, Stassi was taken into protective custody (261).

Government witnesses Dabbiero, DeMarco and Daly, New York City Police detectives, testified to the presence of various defendants in and around the Beach Rose Social Club and identified them in photographs they had taken. These included Inglese, Christiano, Mamone, Delvecchio, Tutino, Lentini, Pellegrino, as well as Stassi and Barnaba (909, 925, 937, 941). In addition, co-conspirator Vincent Papa was also identified by DeMarco from a photograph as having been at the Beach Rose Social Club (938). DeMarco also stated that he conducted surveillance of the Beach Rose Social Club by hiding in a storeroom at a far end of the elevated Pelham train station which overlooked the club (935-6).

Detectives Kevin Daly and James O'Donnel testified to their observations of Stassi's trip from the Pelham Log Cabin to the LoPiccolo expresso shop and Stassi, Tramunti and Vincent DiNapoli's presence at the Tear Drops Bonsoir (951-3, 1103, 1113).

Drug Enforcement Agency chemist Jack Fasanello testified that mannite was a common cutting agent for heroin (1147). He also testified to the presence of heroin traces on the kitchen table and underneath the refrigerator in Frank Stassi's apartment on Vincent Avenue (1137).

Mario Figueroa, a bank guard at the Pelham Bay branch of the Chase Manhattan Bank, testified that he observed the defendant Pellegrino enter the bank on an average of twice a week between mid-1970 and the end of 1972 (1181) and hand a paper bag containing money to a teller who would count it and exchange it for larger bills (1184).

John Barnaba was the government's second major co-conspirator witness. He testified how he came to know the defendant Richard Forbrick, who was the caretaker of an animal hospital on Boston Post Road (1241-2). Barnaba in 1968 or 1969 informed Forbrick that he had once been in jail for narcotics violations (1242). In December 1969 Forbrick approached Barnaba and asked Barnaba if he could get narcotics for him. Barnaba said he would find out. During a subsequent conversation Barnaba told Forbrick that Forbrick had to be actually ready to transact business before Barnaba could secure narcotics for him (1243).

Barnaba testified that he had known Inglese for approximately 15 years (1244). In July 1970 Barnaba asked Inglese at a chance meeting between the two if Inglese could supply him with "goods." (1245). Inglese responded that he could and that Barnaba could find him at the Beach Rose Social Club and that if Inglese was not around Barnaba should see Christiano, Delvecchio or Pellegrino (1246).

In August 1970 Barnaba met Forbrick at the animal hospital. Forbrick told Barnaba that he needed a quarter kilogram of heroin and a quarter kilogram of coke and, that the customers

were Paul "The Arrow" Gregorio (for the heroin) and the defendant Benjamin Tolopka (for the cocaine) (1247-8). Forbrick told Barnaba he would secure the money for the purchase the following day (1249). Barnaba thereupon went to the Beach Rose Social Club to see Inglese. Christiano and Delvecchio were present (1250). Barnaba asked Inglese if he had anything; that he, Barnaba, needed a quarter of heroin and a quarter of coke (1250). Inglese told Barnaba that the total price would be \$8,500 -- \$3,000 for the cocaine and \$5,500 for the heroin (1252). Barnaba returned to the hospital, received Forbrick's approval on the price (1252) and returned to the club. Barnaba told Inglese he would take delivery. Inglese instructed Barnaba to wait up the street in his car (1253). Twenty minutes later Delvecchio and Christiano pulled alongside Barnaba in a car and Christiano, who was sitting in the passenger's seat, passed a brown paper bag to Barnaba and stated that "the coke was marked" (1254). Barnaba then unsuccessfully went to find Forbrick. In Forbrick's absence Barnaba then allegedly delivered the cocaine to Tolopka at Tolopka's home. Tolopka promised Barnaba he would give Forbrick the money the following day (1258). Barnaba then returned to the hospital and gave Forbrick the heroin and told him he had already made delivery of the cocaine to Tolopka (1259). The following day Forbrick gave Barnaba the money plus an additional \$1,000, representing Barnaba's agreed commission of \$500 per every quarter kilo of narcotics he supplied to Forbrick (1260-66). Barnaba then took the money to the club. Inglese and Christiano were present. Inglese advised Barnaba that in

future all transactions would have to be conducted with the money being paid in advance (1262).

In September 1970 Barnaba was asked by Forbrick to obtain a quarter kilogram of heroin which Forbrick had arranged to sell to a person named Barnes (1298). Barnaba arranged to obtain the quarter kilo from Inglese for \$5,500 (1299). Barnaba then received \$6,000 from Forbrick, took out his \$500 commission and returned to the club where he paid Inglese (1300); Christiano was present. Inglese instructed Barnaba to wait. At approximately midnight Barnaba, Frank Stassi, Inglese and Pellegrino remained in the club (1302). Christiano, who had gone out, returned and about 15 minutes after the hour Inglese motioned Barnaba to the bathroom where Inglese removed a bag from behind the bowl and handed it to Barnaba (1303-4). Barnaba returned to the animal hospital and gave the package to Forbrick (1305).

Barnaba also testified that he knew the defendant Dominick Lessa and that during the early part of October 1970 he and Lessa had a conversation at the Pine Tree Inn located on Boston Post Road in the Bronx. Lessa allegedly asked Barnaba whether Barnaba was trading in narcotics and whether he could supply Lessa (1306). Barnaba said although he was, he had nothing available. They exchanged phone numbers and left.

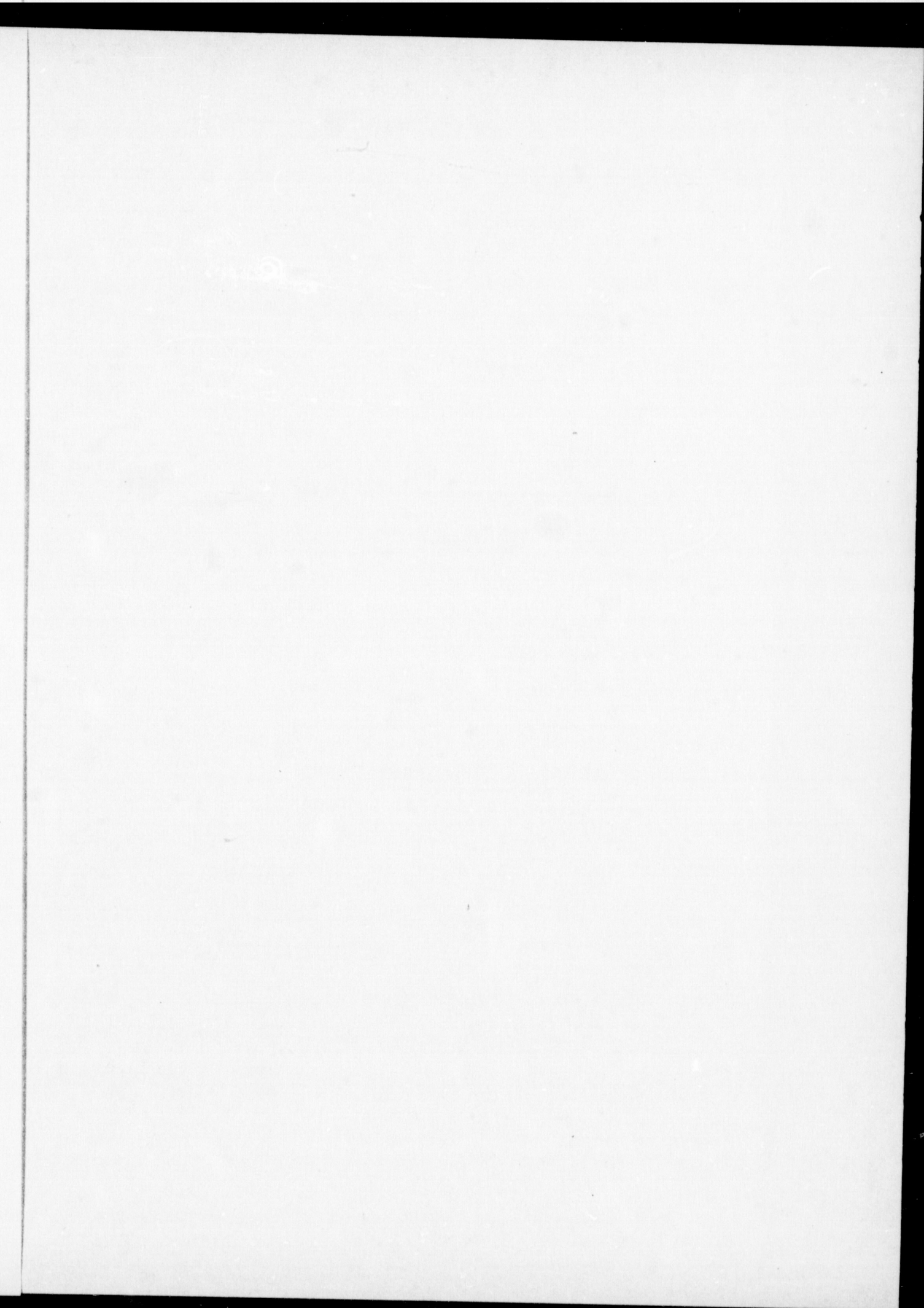
The day after the conversation with Lessa, Barnaba met Forbrick who told him he had a purchase arranged with someone named Trinnie and that he needed two quarters. Barnaba thought he could obtain the narcotics and the two went to meet Trinnie

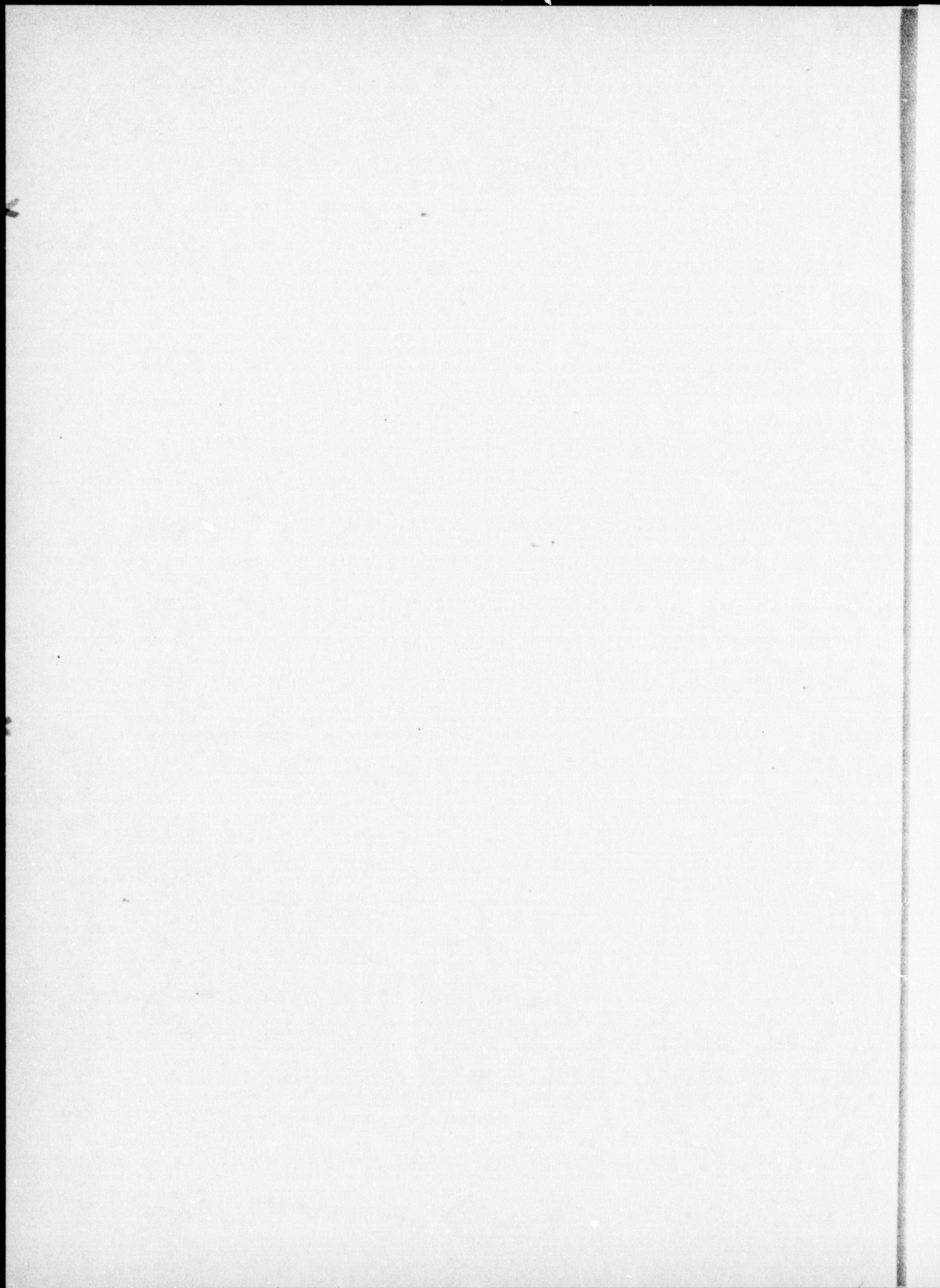
and his partner, Louis Lepore, at the Pine Tree Inn (1306-8). At the Pine Tree Inn Trinnie told Barnaba that Lepore's customer "Mike" would make payment the day after delivery and that Trinnie wanted a wholesale deal. A price of \$5,100 per quarter kilo of heroin was agreed on. Barnaba called Lessa the following day and told Lessa to meet him at the Pine Tree Inn that evening (1309-10). At their meeting that evening Lessa agreed to obtain the narcotics at the quoted price and the pair then drove in Lessa's car over the Whitestone Bridge to Queens (1310). Fifteen minutes over the bridge, the pair pulled off the highway and parked on a side street. Lessa left the car and walked up the street to a bar (1312). Twenty minutes later he returned to the car where Barnaba was waiting and handed him a brown paper bag containing the narcotics (1312). Barnaba told Lessa he would give him the money the following day. Barnaba then returned to the hospital and gave the packages to Forbrick. Forbrick summoned Lepore, who had been waiting in the Pine Tree Inn, and Lepore and his customer Mike arrived (1315). Lepore paid Forbrick for his quarter and Barnaba handed Lepore the package; Mike promised payment the following day and Barnaba gave him his quarter (1316). The following day Mike paid Forbrick and Forbrick gave the money to Barnaba, who in turn contacted Lessa and arranged to meet him on Pilgrim Avenue in the Bronx (1317). Barnaba met Lessa and paid him the \$10,000 (1318).

A few weeks later in October 1970 Barnaba was told by Forbrick that he needed an eighth of cocaine (1319). Barnaba called Lessa and arranged to meet him at the Pine Tree Inn that

night at nine o'clock. After meeting that evening they again traveled by car over the Whitestone Bridge (1320). During their ride Lessa told Barnaba that he was doing business with Vinnie Papa (1321). When they arrived at the location Barnaba waited in the car. Lessa returned and stated that in addition to the eighth that Barnaba needed he could get an additional two quarter kilos of cocaine (1321). The eighth would cost \$1,800 and the quarters \$3,500 apiece (1322). Barnaba said that he didn't know if he could sell the quarters and stated further that the price was "steep" and that he was receiving narcotics at a cheaper rate from Inglese. Lessa left and then returned and handed Barnaba a package containing the eighth and another two quarters of cocaine (1326), which he delivered to Forbrick. Forbrick stated that he thought the two quarter kilos of cocaine could be sold to "The Arrow" (1327). The next day Forbrick told Barnaba that Ben Tolopka, whom the eighth of cocaine had been sold to, had returned the cocaine to Forbrick and complained of its quality. Barnaba attempted to compel Tolopka to take the cocaine back but was unsuccessful and Barnaba directed Forbrick not to sell to Tolopka again (1330). That evening Barnaba met Lessa and told him that he was unable to sell the quarter kilos of cocaine and he wanted to return them. Lessa agreed (1331).

The next day Forbrick told Barnaba that he thought he could sell the eighth of cocaine, which Tolopka had returned, to The Arrow and they could recoup the \$1,300 they had paid for it (1331). Barnaba then unsuccessfully attempted to stall the payment for the eighth to Lessa (1333). The next day The Arrow





agreed to take the eighth.

About that time a message was sent to Barnaba that Inglese wished to see him. Barnaba described the incident:

"MR. CURRAN:

"Q Did you have a conversation with the defendant Inglese at that time?

"A Yes. He said that if I needed anything he had it, and at this time, a little later, Joe Crow [Delvecchio] says, 'What you been doing? You been buying from somebody else?'

I says, 'No'." (1336)

Thereafter, in November 1970 Forbrick informed Barnaba that he needed a quarter of cocaine and a quarter of heroin. Barnaba went to the club and told Inglese what he needed. Inglese promised delivery for that night (1337). Barnaba obtained \$8,500 from Frobrick and returned to the club. Inglese and Delvecchio were there. Barnaba paid Inglese and delivery was again made by Delvecchio and Christiano in a pass of the narcotics between automobiles similar to their previous transaction (1339). Barnaba returned to the animal hospital. On the way in he passed a Negro man and a white girl whom Barnaba did not know. Forbrick indicated to Barnaba that they were "all right" (1340) and that they were "from Washington." (1341). Barnaba received \$1,000 from Frobrick for the purchase of the narcotics from Inglese (1341).

Later in the month of November 1970 Forbrick ordered a quarter kilogram of heroin from Barnaba. Barnaba went to the club and saw Inglese (1355). Christiano and Delvecchio were present. Inglese agreed to make delivery and Barnaba in turn

secured \$6,000 from Forbrick, of which \$500 was Barnaba's commission (1355). Barnaba delivered the money to Inglese at the club. Inglese then spoke with Christiano and Stassi. Stassi then instructed Barnaba to wait in the club; that he, Stassi, would put the narcotics in Barnaba's car. Barnaba waited. Twenty minutes later Stassi and Christiano returned. Barnaba went to his car and the narcotics were there in a paper bag on the driver's seat (1357). Barnaba then delivered the package to Forbrick.

At the end of November 1970 Forbrick ordered another quarter kilo of heroin. Barnaba arranged with Inglese for the purchase and after obtaining \$5,500 from Forbrick, delivered the cash to Inglese at the Beach Rose Social Club (1360). The defendant Mamone, who was present, allegedly assisted Inglese in counting the money at Inglese's request (1360). At Inglese's direction, Barnaba went to Inglese's home that night. Delvecchio and Christiano were present and Christiano handed Barnaba the package containing the quarter kilo of heroin (1362), which Barnaba in turn delivered to Forbrick.

Another transaction for an eighth of a kilogram of heroin occurred in December 1970 (1363). Forbrick gave Barnaba \$3,500 and Barnaba arranged with Inglese, in the presence of Delvecchio and Christiano, to pick up the eighth. Upon his return to the club, however, Barnaba was told by Inglese that he did not have the narcotics and that Barnaba should return the following night (1365). Barnaba did return but Inglese again failed to produce the quarter kilo. For the next ten days Barnaba tried unsuccessfully to get delivery of the narcotics but was put off by Inglese

(1366). Inglese told Barnaba that the money was in good hands, that delivery would be made and that he should not worry.

During one of Barnaba's trips to the Beach Rose Social Club during this period, he testified that he observed a tall thin man carry two shirt boxes into the club and take them into the back and leave them with Inglese (1366-7).

Barnaba informed Inglese that Forbrick was very concerned about his money and requested Inglese to meet Forbrick to reassure him. Inglese, who was at first hesitant, agreed to meet Forbrick when, as Barnaba alleged, Angelo Mamone, who had overheard their conversation in the club, stated to Inglese that Forbrick was "okay." (1368). Thereafter, Barnaba introduced Forbrick to Inglese, who reassured Forbrick that nothing was wrong and promised Forbrick the transaction would be consummated (1369). Later Barnaba requested Inglese not to sell directly to Forbrick, which would jeopardize Barnaba's commission, but, rather, to make sure the sale went through Barnaba (1370). To this Inglese agreed.

During this period of time when Barnaba claimed to have been in the club on an almost daily basis, he testified that he saw Ralph "The General" Tutino at the club. Barnaba stated that on one occasion when Tutino was leaving the club he heard Tutino yell to Inglese: "I'm leaving." And Inglese replied: "Are you going to see this guy?", to which Tutino replied, "Yes. . . I'll see if I can pull twelve packages off." (1371). Over objection, Barnaba stated that he believed 12 packages to mean 12 kilograms of heroin (1372). Upon Tutino's announcement of his mission,

to see, Vinnie Papa?", to which Inglese said "Yes," but "He's not going to get nothing from him, that guy is nasty, you can't even talk to him." (1372).

Towards the end of this two-week period of waiting, Barnaba told Inglese that Forbrick wanted his money back. Inglese agreed and the money was returned (1373-4).

In December 1970, at Forbrick's request, Barnaba purchased a half kilogram of heroin from Anthony Loria for \$15,000 (1377). Barnaba delivered the half kilo to Forbrick, who in turn, sold it to a Paulie "The Arrow" Gregorio, who was on crutches (1380). Barnaba then said that he had been told by the defendant Frank "Butch" Pugliese that Pugliese had shot Gregorio in the knee at the apartment of a black man named Hank while attempting to secure repayment of a narcotics debt (1418-21). Later testimony revealed that the nickname of the defendant John Springer, a customer of Pugliese's, was Hank (1431-2).

In May 1971 Barnaba, who was then working at a used car lot in the Bronx, was approached by a man named Burke who said he had been sent to the lot by Forbrick and that he needed an eighth of a kilo of heroin (1422). Barnaba instructed him to return the following day with \$3,000. That afternoon Barnaba went to the Beach Rose Social Club and spoke with Inglese. Inglese said the best he could do for Barnaba was to give him a pure ounce of heroin and three ounces of mannite and that Barnaba should mix them himself (1423). Barnaba agreed and gave Inglese \$2,000. That night Barnaba made up the eighth kilogram. The

following day Barnaba gave the package to Burke at the lot (1425). A few days later Barnaba was told by the lot manager that while Barnaba was out some men had come looking for him and that they had put a gun to the manager's head and wanted to know where Barnaba lived (1425). Barnaba called Burke at Burke's hotel and asked what was wrong. Burke said the narcotics were no good, that he had thrown them down the toilet and that he wanted his money back. Barnaba refused. A few days later Burke went to Barnaba's house looking for him but Barnaba was not home (1426). Barnaba then went to see Inglese, who said there was nothing that could be done and that he would try to find out who Burke was. Angelo Mamone, who was present in the club, allegedly overheard the conversation and told Inglese that Burke owed him 25 or 30-thousand dollars and that he would take care of it (1427-8). A few days later Barnaba met Mamone outside the club and Mamone told Barnaba that he had taken care of Burke's complaint but that Barnaba would owe Mamone the money (1428). Barnaba never paid Mamone.

Barnaba then turned his testimony away from the activities centering in and around the Beach Rose Social Club and testified regarding his relationship with Frank "Butch" Pugliese.

In August 1971 Barnaba met with Pugliese by pre-arrangement at Izzy's luncheonette on Buhre and Westchester Avenues in the Bronx (1430). Barnaba had complained that his narcotics business was doing poorly. Barnaba and Pugliese then drove to the house of the defendant John Springer whom Pugliese introduced as "Hank." Pugliese told Hank that if he needed anything he should get it from Barnaba (1432). Barnaba gave Springer his phone number.

Two days later Barnaba again met Pugliese at Izzy's. Accompanying Pugliese were Pat Dilacio and Harry Pannierello (1433, 1446). Pugliese told Dilacio in Barnaba's presence that if Barnaba needed anything Pannierello should give it to him and that it was acceptable for Barnaba to be given narcotics on consignment (1434). Dilacio and Barnaba exchanged telephone numbers. Barnaba was also told that the price of a kilogram of heroin was \$25,000.

A few nights later Barnaba received a telephone call from Springer. A meeting was arranged at Springer's house. Springer told Barnaba he needed an ounce of heroin and Barnaba replied it would cost \$3,500. Barnaba left Springer's house, called Dilacio and arranged to meet Dilacio to procure the ounce. After receiving the heroin from Dilacio he returned to Springer's house and delivered the ounce. Springer paid him and Barnaba left (1437). Barnaba later paid Dilacio \$3,000, keeping \$500 for himself as commission.

Later in August or early September 1971 Barnaba went with Pugliese to a delicatessen on Lydig Avenue in the Bronx (1439). There Pugliese introduced Barnaba to Anthony Pagano, another of Pugliese's customers. Pugliese advised Pagano as he had Springer, that if Pagano needed anything he should get it from Barnaba. Pagano took Barnaba's phone number. Pugliese told Pagano that he was going away to jail and that was why he should deal with Barnaba (1439). After leaving the delicatessen Pugliese told Barnaba that Pagano owed Pugliese \$3,000.

A few nights later at Izzy's luncheonette, Pugliese introduced Barnaba to Joseph LaSalata, a/k/a Joe Sharp. Pugliese told Barnaba he could store narcotics in LaSalata's house but that LaSalata was to get \$100 for every ounce sold that had been stored in LaSalata's house (1440).

LaSalata, who later testified for the government, corroborated this testimony (2936, 3304).

During the next few days Barnaba again went to Izzy's at Pugliese's request. There Pugliese introduced Barnaba to Frank Russo, although Barnaba had already known Russo (1441). Russo told Barnaba and Pugliese he needed an eighth of a kilogram of heroin. Arrangements were made for Barnaba to make delivery that night to Russo in the parking lot of Tardi's catering establishment in the Bronx (1441). Later that evening after obtaining the eighth from Pugliese, Barnaba met Russo and gave him the package containing the heroin (1443). Barnaba returned to Izzy's where he met Pugliese. From there the two drove to the Tremont Diner where Russo met them and paid Pugliese \$3,000 (1443). Pugliese gave Barnaba \$200.

In September or October 1971 Barnaba, Pugliese, Pannierello and Dilacio met at Izzy's luncheonette. Pugliese directed Dilacio to give a half kilogram of heroin in the form of one-eighth kilo packets to Barnaba on consignment. The following night Barnaba picked up Joe Sharp, to whom he was going to give the package to hold, and Barnaba and Sharp then met Dilacio on Eastchester Road, where the transfer took place (1447-8). Barnaba gave the package to Sharp along with an

overnight bag containing a scale and a thermometer which Pugliese had directed Barnaba to give to Joe Sharp (1449).

In late October or November 1971 Barnaba was contacted three times by Springer (1449). On each occasion Springer purchased an eighth of a kilo of heroin from Barnaba for \$4,500 per eighth (1450). Barnaba obtained the eighths from the stash at Joe Sharp's.

In November 1971 Barnaba testified that he was contacted by Frank Monaco, a man he had known for ten years. Monaco arranged with Barnaba to purchase an eighth, which Monaco intended to resell to a customer named Dingle (1451). Barnaba obtained the eighth from Joe Sharp and gave it to Monaco, who in turn sold it to his customers for \$3,500. Barnaba and Monaco each took \$250 from the \$3,500. Barnaba also gave Joe Sharp \$100 (1452).

In November 1971 Barnaba repaid Dilacio all but \$1,700 of the \$12,500 for the half kilo which he owed (1452-3).

During November 1971 Barnaba met Dilacio at his apartment. Pannierello was present and asked Barnaba to take a ride with him. Barnaba and Pannierello drove up Tremont Avenue. Pannierello left the car and Barnaba then observed Dilacio and the defendant John Gamba talking on the street (1453-4). Pannierello spoke with them and when he returned to the car he and Barnaba drove over the George Washington Bridge to New Jersey. About 15 minutes over the bridge they pulled in behind a Howard Johnson motel and parked to the rear of a car which had Washington license plates. Pannierello left the car and handed a package to the occupants of the automobile (1455).

The government elicited from Barnaba that in the course of a mid-September 1971 conversation between Barnaba and Pugliese at Izzy's luncheonette, Pugliese had told Barnaba that Inglese had asked Pugliese to ask Vinnie Papa if Papa would give Inglese a package on consignment. Pugliese refused, saying that "GiGi was drowning and he wants me to drown with him." Pugliese further stated that when he asked Inglese on what basis Papa would give Inglese a package on consignment, Pugliese stated that Inglese replied, "We're tight, I call him Uncle. . . I pulled a car off a ship one time for him with ten packages in it." (1456-7).

In October 1971 Barnaba had occasion to go to the Cottage Inn with Pugliese. Pugliese allegedly told him on that occasion, in the presence of Joe Sharp, that he, Pugliese, was partners with the defendant Joseph DiNapoli in everything except the Cottage Inn (1457-8).

Barnaba also testified that while walking past a grocery store in the company of Pugliese at 119th Street and Pleasant Avenue, Barnaba recognized a man leaving the store as the same person he had seen in December 1970 enter the Beach Rose Social Club carrying shirt boxes. Pugliese responded that the man was a customer of Inglese's and that the shirt boxes had been filled with money (1499).

On the night before Pugliese went to jail Pugliese had a small party. Present, according to Barnaba, were himself and Pugliese, Gamba, Pannierello, Dilacio and LaSalata. During the party Barnaba testified, Pugliese asked him for his opinion

about using Gamba to store narcotics. Barnaba stated that he replied there was nothing he could tell him about Gamba on the question.

Towards the end of December 1971 Barnaba was present in Pat Dilacio's apartment on Pelham Parkway. Barnaba had gone there to obtain more narcotics from Dilacio since Barnaba had none. Dilacio, who had none either, stated that he had tried to get some from the defendant DiNapoli but had been refused and that he was trying to obtain some from the defendant Angelo "Butch" Mamone, whom Dilacio characterized as being another partner of DiNapoli's (1441).

In October 1971, on the day Butch Pugliese went to jail, Barnaba and Pannierello were present in the courthouse with him. At that time Pugliese introduced Barnaba to the defendant Basil Hansen (1468-72).

On redirect examination, a tape was played of a conversation of November 22, 1972 (Gov. Ex. 65) among Inglese, Christiano, Lentini and Barnaba. This conversation, recorded by a hidden transceiver concealed on Barnaba, allegedly concerned Inglese's inability to supply Barnaba with narcotics because of the high prices being asked (1850).

Agent Albert Logan of the Drug Enforcement Agency testified that Thomas "Tennessee" Dawson of Washington, D.C., a prosecution witness named as a defendant in the indictment,* had introduced him to Harry and John Pannierello at a pre-arranged meeting. Dawson was there to assist the Pannierellos in obtaining

* Dawson had pleaded guilty prior to trial and agreed to testify for the government.

\$20,000 from the defendants Henry Salli and Warren Robinson (2008-9). Logan also testified that Pannierello offered to sell Logan a quarter of a kilogram for \$9,500. Logan agreed and it was arranged that Logan would meet the courier, Jimmy Provitera, at the Landmark Hotel on January 10, 1973 (2011). On the appointed day the transaction occurred (2015) and an agreement to deliver the money on January 15, 1973 was made (2016).

As a result of these and similar transactions in late January 1973, the Pannierello brothers and James Provitera were arrested and subsequently agreed to cooperate with the government.

The testimony of Pannierello and Provitera described the distribution of narcotics to the defendants Basil Hansen, Estelle Hansen, Henry Salli, John Springer, Hattie Ware, William Alonzo and Al Greene, and Pannierello's inheritance with Pat Dilacio of Frank Pugliese's narcotics operation.

Pannierello testified, among other things, that in June 1971 he took Butch Pugliese to the home of DiNapoli's wife on Bronxdale Avenue and delivered eight to ten thousand dollars in cash.

Finally, the government offered into evidence against all the defendants on trial a suitcase which contained almost \$1,000,000 in cash. The suitcase had been seized from the defendant DiNapoli and co-conspirator Vincent Papa on the night of February 3, 1972.

POINT I.

THE JURY WAS PERMITTED -- INDEED COMPELLED
-- TO SPECULATE ON NEARLY \$1,000,000 WORTH
OF ASSORTED CRIMINAL ACTIVITY UNRELATED TO
THE ISSUES IN THIS CASE

In February 1972 federal agents seized a suitcase from Joseph DiNapoli and Vincent Papa containing \$967,450 in cash. At trial the court admitted into evidence this extraordinary amount of money against all the defendants, in spite of the fact that virtually all of the money bore no direct connection to any of the transactions testified to by the government's witnesses, or any other material aspect of the case. Simply stated, this evidence amounted to a million dollars worth of prejudice.

The impact upon the jury could not have been more dramatic. Clearly to them this money was dirty money, the booty of assorted criminal acts on the part of all those against whom it was admitted. No one possesses that kind of money legitimately. Its admission steamrolled over the right of the defendants to be tried solely on the charges contained in the indictment. Indeed, the sheer magnitude of this most damning evidence could not have failed to convince the jury that the defendants must have been engaged in a wide range of well-paying illegal enterprises, particularly because the government failed to show any direct link between better than 90% of this money and the other evidence in the case. Thus, to the jury, along with \$1,000,000 went the suggestion -- indeed, the compelling invitation -- to speculate about a million dollars worth of criminal activity. The receipt

of this evidence stretched the rules of relevancy to their bursting point when considered against its awesome prejudicial impact.

Because the question of admissibility is always a matter to be determined on the facts of the particular case, the crucial question here is whether the seized money was sufficiently connected to any material issue in the case to offset its overwhelming prejudicial impact.

The defendants here were indicted for conspiracy to violate the narcotics laws. As evidence of the conspiracy, the government offered testimony relating to a number of transactions in illicit narcotics taking place at various times and places over the temporal range of the conspiracy. The money seized from DiNapoli and Papa, to the extent that it is relevant at all, is relevant only insofar as it rationally tends to prove or corroborate events and transactions showing the existence of the conspiracy and the culpability of the alleged co-conspirators.

Viewed in the light most favorable to the government, the evidence shows that DiNapoli joined the conspiracy in June 1971. DiNapoli was portrayed by the government as a wholesaler for Frank Pugliese, who, according to the government, left his "business" to Pat Dilacio and Harry Pannierello in October of 1971 when it became clear to Pugliese that he was to go to jail on state narcotics charges. At that time Pugliese, according to Pannierello, left to Pannierello and Dilacio two kilograms of heroin, for which Dilacio was to pay DiNapoli, the supplier, \$22,000 apiece. The only other evidence in the record even

remotely tending to establish a flow of money to DiNapoli in exchange for drugs was a December 1971 transaction in which Dilacio was to obtain another kilogram of heroin from DiNapoli for another \$22,000.

Thus, according to the evidence adduced by the government, a total of \$66,000 could have come into the hands of Joseph DiNapoli by February 1972, as the result of the transactions testified to at trial. But this leaves the staggering sum of more than \$900,000 unaccounted for in any way by the government's evidence, unrelated in any way to the transactions proved in this case. Thus, without any evidence linking this \$900,000 to the charge of conspiracy, the jury was invited to speculate about how the defendants reaped this undoubtedly tainted money. To the extent, therefore, that no rational link was or could be forged between the vast bulk of the money and the material issues at the trial, clearly at least that much of it was irrelevant and inadmissible.

Virtually in point is Williams v. United States, 168 U.S. 382 (1897). In Williams the defendant was charged with extorting, under color of office as a Chinese inspector, separate sums of \$100 and \$85 from two Chinese seeking entry into the United States. At trial the government offered evidence that the defendant, who earned around \$150 per month from the government, had \$4,750 on deposit at various banks, and the bank books were admitted against him. Reversing the conviction and ordering a new trial, the Supreme Court held that the bank books should not have been admitted into evidence. They were irrelevant to the

issues in the case, held the Court, because there was no showing that the \$4,750 bore any connection to the allegations of extortion contained in the indictment. Significantly, the court focused upon two factors: first, the lack of any evidence linking the money on deposit with the extortion charge, and second, the enormous disparity between the amounts deposited and the amounts alleged to have been extorted, which stripped all rational basis from the inference that any part of the money in the bank was the result of the extortion charged. The Court held:

"The utmost the evidence tended to show was that the accused had in his possession at different times certain sums that were deposited by him in a bank to his credit or to the credit of his wife. It is to be observed that no sum so deposited corresponded in amount with the sums which he was charged with having extorted. . . Upon the face of the transactions referred to there was no necessary connection between the deposits and the specific charges against the defendant. . . The manifest object and the necessary effect of this evidence were merely to give color to the present charges, and to cause the jury to believe that the accused had in his possession more money than a man in his condition could have obtained by honest methods, and, therefore, he must be guilty of extorting the two sums in question. . . The jury may have been unable to say from the evidence where the defendant obtained the moneys deposited in the bank and specified in the bank book, aggregating \$4,750 between certain dates. But that did not justify the conclusion that he had, under color of his office. . . extorted \$100 upon one occasion and \$85 on another occasion." (Id. at 396) (Emphasis supplied)

The very same reasoning applies here. For here, as in Williams, an accused was found in possession of an amount of money far exceeding the proceeds of transactions attributed to him; here too, a very great sum of money was admitted without establishing any rational nexus between the bulk of it and the criminal activity charged in the indictment. Thus, here, as in Williams, raw evidence, pregnant with the clear implication of unproved

criminal conduct went unpalliated to the jury for their consideration. Undoubtedly, the net effect here was, as the Court found in Williams, "to give color to the present charges and to cause the jury to believe that the [defendants] had in [their] possession more money than a man. . . . could have obtained by honest means and, therefore, [they] must be guilty," of the conspiracy alleged.

Nor is the position urged here and adopted by the Supreme Court in Williams in any way in conflict with the general rule of evidence

"that where a defendant is on trial for a crime in which pecuniary gain is the usual motive, evidence of the sudden acquisition of money by the defendant is admissible even though the source of the money is not traced."

United States v. Jackskion, 102 F.2d 683, 684 (2d Cir. 1939)

For the applicability of this rule, as the cases show, is restricted to instances in which an impecunious defendant suddenly accedes to wealth shortly after the commission of a crime, or where, absent a showing of prior lack of financial resources, and absent any proof tracing the source of the money, the defendant is found in possession of an amount of cash commensurate with the "dollar value," so to speak, of the crime charged. Indeed, it is just this juxtaposition of events which gives rational foundation to the inference that the money found is the fruit of the crime charged, hence obviating any requirement of foundation or tracing of source. Relevance is assured in such instances because there is a natural inference of commission from possession. See, e.g., United States v. Jackskion, supra, (defendant's bank book, showing a balance of \$8,000, admitted

where it was shown that no more than \$1,000 was kept on deposit in the years preceding the year in which defendant was alleged to have operated an illegal distillery); Self v. United States, 249 F.2d 32 (5th Cir. 1957) (money found in defendant's possession admitted against him without a showing of prior impecuniosity when other evidence linked the money to the bank robbery charged); United States v. Manning, 440 F.2d 1105 (5th Cir. 1971) (defendant's movements and possession of an amount of money commensurate with the amount resulting from bank robbery rendered inference of commission from possession natural and necessary); United States v. Kenny, 462 F.2d 1205 (3d Cir. 1972) (\$700,000 in bearer bonds, \$50,000 in cash, and evidence of a \$1.2 million secret bank account properly admitted when evidence linked this concealed wealth with the conspiracy charged).^{*} But see, e.g., United States v. Chaney, 446 F.2d 571 (3rd Cir. 1971) (acknowledging necessity of a showing of prior impecuniosity when possession alone is alleged as supporting inference of commission of robbery), and compare, United States v. Dean, 435 F.2d 1 (6th Cir. 1970)

* The Kenny case involved a massive scheme to line the pockets of various New Jersey public officials and political leaders through bribery, extortion and kickbacks. It was essential to the government's case, therefore, to show how enormously wealthy the defendants had become and to trace the source of that wealth. Accordingly, government witnesses testified that \$700,000 in bearer bonds were acquired at a time when huge sums of money were flowing in to the conspiracy, and in a manner designed to disguise the identity of the true purchaser. \$1.2 million in secret numbered bank accounts was also linked to the objectives of the conspiracy by testimony relating the amounts deposited at various times to like amounts coming in to the conspiracy from the extortion-bribery-kickback scheme. Finally, \$50,000 in cash introduced at trial was marked money which the evidence showed was used by one of the defendants for the purpose of discrediting a key government witness; the money was thus properly admitted on the issue of guilty knowledge.

(defendant's conviction for possession of counterfeit money reversed due to introduction of \$5,000 in good money found in defendant's possession at time of arrest, although government's theory of the case was that defendant was in the business of counterfeiting).

But the rule of Jackskion clearly does have its limits. A recent but classic illustration of where those limits lie is to be found in Judge Weinfeld's ruling on the admissibility of one million dollars in United States v. Cirillo, 72 Cr. 420. In Cirillo, the defendant was charged with obstruction of justice and conspiracy in that he allegedly engaged in a scheme to escape federal detention. Government agents who searched Cirillo's home found over \$1,000,000 in cash, some \$900,000 in Cirillo's back yard and some \$100,000 in his basement. The government sought to introduce testimony as to the seizure of the entire amount in an effort to prove that the defendant had the financial means to escape. Indeed, the \$100,000 seized from the basement was traceable to other aspects of the case, through serial numbers.

Quite correctly, Judge Weinfeld found that this \$100,000 was admissible, as plainly relevant to the issue on which it was offered. But the court ruled that the marginal relevance of the remaining \$900,000 was far outweighed by its prejudicial impact on the jury. To have admitted it would have permitted the government to swat at the proverbial fly with the proverbial sledgehammer. Accordingly, the court excluded the remaining \$900,000.

Judge Weinfeld's decision in Cirillo represents a specific application of the reasoning of the Supreme Court's ruling in Williams v. United States, supra. For both cases make clear that when, as in the instant case, money seized is in an amount far out of proportion to the "dollar value" of the crime or crimes alleged, there is no natural inference to be made that the money possessed is the fruit of the particular crime charged. Rather, the natural inference is that the unaccounted for money must be the fruit of the commission of other crimes. Thus, relevance is distorted and improperly disproportionate prejudice results. Such evidence proves too much. It shows that the defendant is a criminal, not that he committed the crime charged. And it is just this sort of guilt-by-other-conduct reasoning that our system of justice expressly eschews by denying, for example, admissibility to evidence of past crimes committed or alleged to have been committed by the defendant for the purpose of proving that he did in fact commit the crime now charged. Williams v. New York, 337 U.S. 241, 246 (1949).

To permit the convictions in the present case to stand is to undermine this salutary principle. It is to ratify the admissibility of evidence fully 90% of which proved nothing more and nothing less than that these defendants were engaged in a million dollars worth of criminal activity, unrelated to the specific crimes charged in the indictment. No conviction secured in such a manner can be permitted to stand.

Finally, appellants are entitled to a new trial on the substantive as well as conspiracy counts in the indictment. For the substantive charges were wholly intertwined with the conspiracy counts and fair consideration could not be given to either of them in an atmosphere rampant with prejudicial influences. Under these circumstances, retrial on the substantive counts is required (see, United States v. Varelli, 407 F.2d 735, 747-748 (7th Cir. 1969); United States v. Branker, 395 F.2d 881, 887-888 (2d Cir. 1968).

Even assuming, arguendo, that all of the money was admissible against DiNapoli upon some conceivable theory of the case, no such theory could possibly justify the admissibility of the million dollars against the remaining defendants. Indeed, even admitting the evidence with a limiting instruction to the jury could not mitigate its impact. As this Court pointed out in United States v. DeCicco, 435 F.2d 478, 483 (2d Cir. 1970):

"Little discussion is needed to demonstrate that prior . . . acts of misconduct performed by one person cannot be used to infer guilty intent of another person who is not shown to be in any way involved in the prior misconduct, unless it be under a 'birds of a feather' theory of justice. Guilt, however, cannot be inferred merely by association. In any event, we conclude that the prejudice engendered by the admission into evidence of the prior acts of misconduct, even against . . . the doers thereof, far outweighed its legitimate probative worth, and that therefore it was an abuse of discretion for the trial court to allow its admission though the admission of the testimony was accompanied by cautionary instructions to the jury."

POINT II.

THE ARREST OF VINCENT PAPA AND JOSEPH DiNAPOLI
AND THE SUBSEQUENT SEIZURE OF THE MILLION DOLLAR
SUITCASE WAS WITHOUT PROBABLE CAUSE

A. Appellants have standing to Raise the Constitutionality
of the Arrest and Search of their co-Appellants

The threshold question here is whether appellants have standing to raise the constitutionality of the arrest of Papa and DiNapoli and the subsequent search of their car. As the cases demonstrate, appellants clearly do have standing to raise the issue.

It is well established that generally only those persons whose rights were violated under the Fourth Amendment or Section 605 of the Federal Communications Act have standing to object to the introduction of evidence which is obtained as a result of that violation. Co-conspirators and co-defendants ordinarily have no special standing. Alderman v. United States, 394 U.S. 165, 172 (1969); Goldstein v. United States, 316 U.S. 114 (1942). However, there is an exception to this general rule. That is, where it is necessary to exclude evidence admissible against one defendant, in order to protect the rights of another.

In McDonald v. United States, 335 U.S. 451 (1948), the court stated:

"It follows from what we have said that McDonald's motion for suppression of the evidence and the return of the property to him should have been granted. Weeks v. United States, 232 US 383, 58 L.Ed. 652, 34 S.Ct. 341, LRA 191 B 834, Ann Cas 1915C 1177, supra; Go-Bart Importing Co. v. United States, 282 US 344, 75 L.Ed. 374, 383, 51 S.Ct. 153. It was, however, denied and the unlawfully seized evidence was used not only against McDonald but against Washington as well, the two being tried jointly. Apart from this evidence

there seems to have been little or none against Washington. Even though we assume, without deciding, that Washington, who was a guest of McDonald, had no right of privacy that was broken when the officers searched McDonald's room without a warrant, we think that the denial of McDonald's motion was error and was prejudicial to Washington as well. In this case, unlike *Agnello v. United States*, supra, (269 US p. 35, 70 L.Ed. 150, 46 S.Ct. 4, 51 ALR 409), the unlawfully seized materials were the basis of evidence used against the codefendant. If the property had been returned to McDonald, it would not have been available for use at the trial. We can only speculate as to whether other evidence which might have been used against Washington would have been equally probative." 335 U.S. at 456

In *Goldstein v. United States*, supra, the court held that generally only the victim of an illegal wiretap has standing to object. However, it expressly concurred in the holding, in *United States v. Weiss*, 103 F.2d 348, 352 (2d Cir.), reversed on other grounds, 308 U.S. 321 (1939), that it is prejudicial error as to a defendant who was not a participant in any illegally intercepted conversations to admit illegal wiretap evidence at a joint trial with other defendants who were participants in the overheard conversations.

The court stated, at 119-20:

"The question now presented was not decided in *Weiss v. United States*, supra. The charge was conspiracy. Goldstein, who was not a participant, and other defendants who were participants, in the intercepted conversations, were tried together. All objected to testimony respecting the conversations. We held the evidence inadmissible. The fact that Goldstein was not a party to the communications, was not overlooked. In the opinion rendered by the Circuit Court of Appeals it was held that the fact could not sustain his conviction if the messages were erroneously introduced. This court assumed, in deciding the case, that the Circuit Court of Appeals was right in holding that, if the admission of the evidence

was wrong as to the other defendants, the judgment ought to be reversed as to all. And the Circuit Court of Appeals was of the opinion in the present case that, in the circumstances, the messages could not have been used in the Weiss case against one of the defendants and excluded as to the others with any reasonable expectation that prejudice would not have resulted to the defendants as to whom the admission of the messages would have been error. In this view we concur."

This principle recently was reaffirmed in United States v. Bynum, 475 F.2d 832, 836 (2d Cir. 1973).

In the present case, the \$1,000,000 seized from DiNapoli and Papa was introduced against all of the defendants. As fully set forth elsewhere in this brief, the introduction of that money into evidence so substantially prejudiced their case that it jeopardized their right to a fair trial. Accordingly, under the principles expressed above, appellants are entitled to raise the constitutionality of the arrest of Papa and DiNapoli and the subsequent seizure of the \$1,000,000.

B. The Arrest of Papa and DiNapoli was Without Probable Cause

The issue of probable cause is to be determined on the basis of the facts known to the arresting officers at the time of the arrest, and the reasonable inferences to be drawn from those facts. Accordingly, a review of the facts is in order.

On the night of February 3, 1972 agents of the New York Joint Task Force, armed with "John Doe" arrest warrants, set up a surveillance of 1908 Bronxdale Avenue in the Bronx. The attention of the agents had been drawn to this particular address because one of them had made an earlier arrest in the vicinity

for grand larceny of one Joseph DiBennedeto who gave 1908 Bronxdale Avenue as his place of residence (93). After the arrest but before the surveillance on February 3, the agents learned that 1908 was not in fact DiBennedeto's address.

DiBennedeto was known to the agents as the owner of the Cottage Inn, believed to be a place where narcotics transactions had taken place (18). In addition, one of the agents had seen, some six months earlier, an unidentified male engaged in conversation with Francis Facchiano, who had been arrested the month before on a narcotics charge. The unidentified male was seen driving away from this conversation in a car registered to Genevieve Patalano, who resided at 1908 Bronxdale Avenue (89-90). Finally, the agents had driven to 1908 Bronxdale on this particular night after they had been unsuccessful at executing the "John Doe" warrants at two other locations earlier in the evening (19-20). Thus, for the flimsiest of reasons, the agents staked out 1908 Bronxdale Avenue in the belief that it was a major center of narcotics operations.

At about 8:45 p.m. a car pulled up in front of the house (22, 91, 95, 222). An unknown white male emerged from the car carrying a suitcase and entered 1908 Bronxdale (23, 222). The driver of the car made a U-turn, and parked the car just opposite the house (23, 224). From their vantage point the agents identified the driver as Vincent Papa who was known to them as having been once convicted for narcotics violations and believed by them to be a major narcotics trafficker (47).

While continuing their surveillance the agents learned that the car driven by Papa was owned by Wide World Leasing Company (101-102). Because Papa was known to frequent the Queens County area and not the Bronx and because he was observed to be driving a car believed to be leased, the agents concluded that narcotics activity was afoot (102-103).

Some time after 9:00 the agents observed three women leave the 1908 Bronxdale Avenue address (26, 105). Shortly thereafter, an unknown male left the house, got into a car and drove off. The agents followed. After traveling a short distance the car turned in what appeared to be a complete circle. Suspecting that the car was a "decoy" to divert their attention, the agents returned to 1908 Bronxdale (105-106). As it turned out the car was driven by an attorney who had apparently made a wrong turn.

A short time later two unidentified men left the house and drove off in separate cars (26-27).

Finally, at around 9:30 the agents observed Vincent Papa leave the house in the company of Joseph DiNapoli whose identity was then unknown to them.* DiNapoli was carrying a suitcase which appeared to the agents to be the same as the one with which he had earlier entered the house.** From the manner in which

* Although the initial observation of DiNapoli led one of the agents to tentatively identify him as John Doe #3, that identification was withdrawn. DiNapoli's identity was not learned until after his arrest (215).

** One of the agents testified to a radio communication identifying Papa as the carrier of the suitcase (107, 150). But the only two agents in a position to make the identification both testified that it was DiNapoli who carried the suitcase (23, 27, 91, 222).

DiNapoli carried it, the agents concluded that it was heavy (27-28, 233). DiNapoli put the suitcase on the back seat of the car, then entered and drove off with Papa in the driver's seat (28).

Although the court below found that the decision to arrest Papa and DiNapoli was not made until some time thereafter, and was made because weather conditions made the car difficult to follow, the record supports no such conclusion. Rather, the record clearly indicates that the decision to arrest was made as soon as Papa and DiNapoli entered the car and began to drive away (108-109, 152-153).

After driving a few blocks the agents signalled Papa to pull over to the side of the road (29, 58-59, 108, 237-38). Papa got out and walked toward the agents (30, 61-62). He and DiNapoli were placed under arrest (109, 163-64, 240-41, 408). The car was searched (109), the suitcase opened, and \$967,450 in cash was found inside (63, 109, 164).

The facts known to the Joint Task Force agents on the night of February 3, 1972 justified at best a vague suspicion or intuitive hunch that criminal activity was afoot. But neither separately nor cumulatively did the known facts elevate that suspicion or hunch to the level of probable cause. The arrest of Vincent Papa and Joseph DiNapoli and the subsequent search of their car was therefore manifestly unlawful and unconstitutional.

The mere fact that Vincent Papa, who was suspected of being a narcotics violator, and who was known to have been convicted once on narcotics charges, was seen entering a house

which the agents suspected was being used to conduct transactions in narcotics was simply not enough to induce in the agents that constitutionally necessary reasonable belief that a crime was taking place.

In Sibron v. New York, 392 U.S. 40 (1968), the defendant, a known former narcotics addict, was observed to enter a restaurant known to be frequented by narcotics addicts, and was observed in the company of known addicts. Upon leaving the restaurant, Sibron was accosted by a police officer who stopped him, placed his hand in Sibron's pocket and

removed envelopes containing heroin. In holding that the heroin thus discovered should have been suppressed, the Supreme Court noted that the arresting officer lacked not only probable cause, but even that mere reasonable suspicion necessary to justify the "stop and frisk" procedure approved by the court in the companion case of Terry v. Ohio, 392 U.S. 1 (1968):

"The inference that persons who talk to narcotics addicts are engaged in the criminal traffic in narcotics is simply not the sort of reasonable inference required to support an intrusion by the police upon an individual's personal security. Nothing resembling probable cause existed until after the search had turned up the envelopes of heroin . . . Thus the search cannot be justified as incident to a lawful arrest."

Sibron v. New York, supra, at 62-63

Moreover, the fact that DiNapoli, whose identity was unknown to the agents at the time of his arrest, was seen leaving the same house with a suitcase in Papa's company adds nothing significant.

In Henry v. United States, 361 U.S. 98 (1959), agents of the Federal Bureau of Investigation were investigating the theft of an interstate shipment of liquor. The agents, like the arresting officers in the present case, had been informed that one of the defendants, Pierotti, was suspected of involvement in the theft of interstate shipments. The agents observed Pierotti and another leave a tavern, drive to a secluded alley, load several cartons into the car and drive off. Some time later this behavior was repeated. Both defendants were stopped, and a subsequent search of the car showed the cartons to contain stolen radios. Holding that the search was illegal, the court pointed out:

"The fact that packages have been stolen does not make every man who carries a package subject to arrest nor the package subject to seizure. The police must have reasonable grounds to believe that the particular package carried by the citizen is contraband . . . But there was nothing to indicate that the cartons here in issue probably contained liquor. The fact that they contained other contraband appeared only some hours after the arrest. What transpired at or after the time the car was stopped by the officers is, as we have said, irrelevant to the narrow issue before us. To repeat, an arrest is not justified by what the subsequent search discloses. (Emphasis supplied)
Henry v. United States, supra, at 104

Furthermore, the other assorted observations did not so sufficiently color the facts known to the agents as to raise their suspicions to the level of probable cause. Indeed, in a recent case involving similar but far more suggestive facts, Judge Bauman of the Southern District found no probable cause.

In United States v. Gonzalez, 362 F. Supp. 415 (S.D.N.Y.

1973), the attention of Joint Task Force agents had been focused on two men, Rafael Gonzalez and Edward Arroyo. On the basis of information provided by informants, the agents learned that Gonzalez was a major narcotics trafficker. Gonzalez and Arroyo were observed making numerous trips to the lower east side of Manhattan, an area infamous as a hotbed of narcotics activity. On several occasions they were seen making pick-ups and deliveries of brown paper packages, and on others they escorted persons carrying such packages. At one point, in a conversation with an undercover narcotics officer, Gonzalez boasted about the profits he had made in the narcotics business, and about how wealthy those who worked for him had become. Finally, the arrest of Arroyo in Miami in possession of more than 240 pounds of heroin had further substantiated the information provided about Gonzalez by informants.

In mid-January 1972 Gonzalez was observed in the company of Rafael Torres and his wife, who were both unknown to the police at that time. The trio drove to the lower east side and parked for a brief period in the vicinity of the locations where Gonzalez and Arroyo had been observed just a month before making pick-ups and deliveries of brown paper packages. The trio then drove to a midtown motel where Mr. and Mrs. Torres got out. Rafael Torres emerged a short time later and he and Gonzalez returned to the lower east side, parked and entered a building where they remained for about three-quarters of an hour. The two then came back out, and drove off at an excessive rate of speed, eluding the surveilling agents.

The next day Gonzalez was observed visiting the very same building on the lower east side he and Torres had entered the previous evening. Gonzalez then drove to the motel, picked up the Torres and went with them to a restaurant. After returning to the motel, Mrs. Torres got out and Gonzales and Torres for the third time in two days, drove to the lower east side, and for a second time, managed to escape the trailing agents. When two hours later Gonzalez and Torres came back to the motel, Torres got out of the car carrying a brown paper bag. He was arrested and searched. The bag contained \$100,000.

The factual similarity between Gonzalez and the present case is striking. There, just as here, an individual believed to be a major narcotics dealer was observed frequenting a location suspected as a center of narcotics activity. There, as here, the movements of the individuals under observation suggested to the agents the modus operandi of the drug trade. There, as here, an individual unknown to the agents* was seen in the company of a suspected narcotics dealer carrying a receptacle believed to contain narcotics. This is most significant. For just as in Gonzalez, the agents here formed the belief that unidentified individual (DiNapoli) was carrying narcotics simply because he was in the company of a suspected narcotics violator. This kind of guilt-by-association reasoning amounts to the bootstrapping

* DiNapoli, in the present case, was not identified until after his arrest. Prior to that time none of the surveilling agents knew who he was.

of suspicion up to probable cause. Sibron v. New York, supra; United States v. DiRe, 332 U.S. 581, 593 (1948). It was roundly condemned by the court in Gonzalez:

"Although Gonzalez was a notorious narcotics dealer, nothing whatsoever was known about Torres before the day of his arrest including his name. He had been seen for the very first time by Task Force agents the day before . . . Gonzalez' notoriety cannot be imputed to Torres, and any suggestion to the contrary has ominous implications for the Fourth Amendment." Id. at 421

Indeed, the facts known to the agents in Gonzalez were far more incriminating than those available here. In Gonzalez, the police surveillance took place over a period of two days. Gonzalez himself had boasted to an undercover policeman about his importance in the narcotics trade. Gonzalez and Torres were observed frequenting the very same places where Gonzalez had been seen making pick-ups and deliveries of brown paper bags, and were seen together there not once but several times. Gonzalez and Torres took what the agents believed to be affirmative action to avoid surveillance by driving evasively, on two separate occasions. Torres, at the time of his arrest, was carrying the infamous brown paper bag, an object identical in description to those which Gonzalez, a known narcotics dealer, had been observed picking up and delivering on other occasions. None of these factors is present here. Yet the court in Gonzalez, relying on a long line of cases, found no probable cause:

"In conclusion, I find that the Task Force agents did not have probable cause to arrest Torres. Several factors. . . are missing here. The agents received no tip from an informer, reliable or otherwise, that there would be a narcotics transaction or that Torres was a narcotics trafficker.

There was nothing intrinsically suspicious in the activities of Torres and Gonzalez: no furtive movements, no [genuine] suggestion of flight. There were no conversations between the two men overheard that might suggest illegal activity . . . Given all these circumstances, I cannot conclude that a prudent man would have been warranted in believing that an offense had been committed by Torres that night.

United States v. Gonzalez, supra, at 422

Similarly here, there was no informer's tip, no inherently suspicious activities, no furtive movements, no suggestion of flight, no overheard conversations, and, most importantly, nothing, except guilt by association, upon which to base the belief that DiNapoli, in whose sole possession the suitcase was observed, was carrying narcotics. What is more, the information known to the agents in the present case was far less incriminating than that known in Gonzalez. Thus, where probable cause in Gonzalez was a "knife edge proposition," United States v. Gonzalez, supra, at 419, in the present case, it is obviously absent. The Task Force agents here simply lacked enough factual information to elevate suspicion to the plane of probable cause.* Accordingly, the evidence seized as the fruit of their search of the case should have been suppressed.

Finally, even assuming, arguendo, that the agents had probable cause to arrest Papa, there was certainly no probable cause to arrest DiNapoli, and hence, no probable cause to seize the million dollar suitcase. For, as noted above, nothing at all was known to the agents about DiNapoli until after his arrest. The only conceivable justification for his arrest was his association with Papa, and this, as noted above, simply will not do.

* Even assuming probable cause to seize the suitcase, it was unlawfully opened in the absence of a warrant. United States v. Soriano, 482 F.2d 469 (5th Cir. 1973).

Sibron v. New York, supra; United States v. DiRe, supra, United States v. Gonzalez, supra.

But since the suitcase was in DiNapoli's exclusive possession, there could be no justification for its seizure either. In United States v. Del Toro, 464 F.2d 520 (2d Cir. 1972), federal agents had obtained an arrest warrant for one Rivera, a known narcotics trafficker. Rivera was observed leaving a bar in the company of Del Toro, about whom the agents knew nothing. As the two men left in Rivera's car, the agents closed in and ordered both to get out of the car. Rivera was searched and found to be in possession of cocaine. After being ordered out of the car, Del Toro was frisked. One of the agents felt a small, hard object in one of Del Toro's pockets. The object turned out to be a folded ten-dollar bill containing cocaine. This Court found the search illegal, holding that a too generous view of the evidence "would make illusory the Fourth Amendment protection against unreasonable searches and seizures." Id. at 522.

A similar view of the facts must prevail here. Nothing known to the agents linked DiNapoli to Papa's suspected narcotics activity. The suitcase was in DiNapoli's possession at all times. There was, therefore, no reason to believe that it contained contraband. And since Papa got out of the car and walked toward the agents after his car was stopped, it cannot be seriously argued that the search of DiNapoli and seizure of the suitcase was justifiable because DiNapoli and the suitcase were within the area from which Papa "might gain possession of a weapon or

destructible evidence." Chimel v. California, 395 U.S. 752, 763 (1969); United States v. Del Toro, supra, at 521, n. 5.

Accordingly, and for the reasons expressed above, the evidence should have been suppressed.

POINT III.

THOUGH THE INDICTMENT CHARGED ONE CONSPIRACY, THE PROOF ESTABLISHED TWO SEPARATE AND INDEPENDENT CONSPIRACIES WHICH DID NOT COOPERATE, BUT COMPETED, WITH EACH OTHER. THIS VARIANCE BETWEEN INDICTMENT AND PROOF AFFECTED THE SUBSTANTIAL RIGHTS OF THE APPELLANTS

Introduction

In contrast to the usual narcotic conspiracy case where separate groups of importers, wholesalers, middlemen and retailers are chained together in one cooperative venture, each contributing to the success of the whole (e.g., United States v. Borelli, 336 F.2d 376 (2d Cir. 1964); United States v. Agueci, 310 F.2d 817 (2d Cir. 1962); United States v. Bruno, 105 F.2d 921 (2d Cir. 1939)), the evidence in the present case clearly established two independent conspiracies, each with its own source of supply, its own customers, its own core conspirators, and its own base of operations. The activities of one had nothing to do with the activities of the other. They neither bought nor sold to each other and each pursued its own interests without concern or contribution to the success of the other. The two groups were, in fact, competitors and not confederates. In such circumstances, multiple conspiracies were established under Kotteakos v. United States, 328 U.S. 753 (1945).^{*} Moreover, the variance between the indictment and proof affected the substantial rights of the appellants Inglese, Christiano and Ceriale since they were severely prejudiced by the introduction of damaging proof

^{*} A motion to dismiss the conspiracy count on this ground was made and denied at trial (e.g., 3682-3).

concerning the wide-ranging criminal activities of a conspiracy with which they were not involved.

I.

Taking the view of the evidence most favorable to the government, the proof showed two groups of narcotics dealers. The first, which may be denominated the Tramunti-Inglese group, operated from the Beach Rose Social Club and later the LoPiccolo coffee house. The government alleged that Tramunti was the financier of this group and Inglese the chief operations officer. Inglese's directives were carried out by Delvecchio with the assistance of Christiano, Lentini, Stassi and Pelligrino. Joseph Ceriale, operating from a barbershop in East Harlem, supplied mannite to the Inglese group. George Toutoian on one occasion supplied heroin to Stassi and frequented the Beach Rose Social Club. He also attempted, apparently unsuccessfully, to obtain heroin from Vincent Papa, an unindicted co-conspirator. No source for this group's narcotics was shown. Cadman and Marchese were customers of Inglese, while D'Amico bought narcotics from Stassi, which Stassi had obtained from Toutoian. John Barnaba, from July 1970 to August 1971 purchased drugs from Inglese, and also from Dominick Lessa and Anthony Loria. He sold drugs to Richard Forbrick at a commission. These drugs were purchased primarily from Inglese. Barnaba was warned by Inglese and Delvecchio, however, not to purchase narcotics from anyone but them. In late August 1971 Barnaba became a member of the DiNapoli-Pugliese group and ceased transacting business with Inglese.

The second group, the DiNapoli-Pugliese group, was, according to the government, financed by Joseph DiNapoli and

operated by Frank "Butch" Pugliese. Pugliese's lieutenants were Pannierello and Dilacio. Provitera and Gamba were delivery man and stash man, respectively. Pugliese's drugs were also stored in the garages of LaSalata and Spataro. Meetings were held at Izzy's Luncheonette. The source of this group's narcotics, according to the government, was Vincent Papa. Barnaba, after defecting from the Inglese group, joined the Pugliese group in 1971, and sold drugs for them on consignment. The customers of this group were Russo, Monaco, Robinson, Springer, Dawson, Greene, Alonzo a/k/a Butch Ware, Hattie Ware, Salley, and Basil and Estelle Hansen. Sales of narcotics to Dawson were destined for other customers in Washington, D.C.

The proof also concerned other defendants who were essentially free agents who dealt peripherally with one or the other of the two groups. Lessa, for instance, sold narcotics in October 1970 to Barnaba which he had allegedly obtained from Papa, and in late 1972 Lessa bought cocaine from Lentini which had come from Jack Spada. Anthony Loria sold narcotics to John Barnaba at a time when Barnaba was buying from Inglese. Carmine Pugliese sold narcotics to Pannierello and Dilacio when DiNapoli would not supply them. Jack Spada was not a member of either group, but rather a worker for Herbert Sperling (see, United States v. Sperling, 73-2363, brief for government, pp. 36-40). On one occasion he gave cocaine to Stassi for Lentini.

Angelo Mamone was a gambler who frequented the Beach Rose Social Club, but never sold or received narcotics to or from the Inglese group. After Barnaba defected to the Pugliese group, he was told by Dilacio that Mamone was a partner of Pugliese.

The facts thus show two independent conspiratorial groups, with different core conspirators and different distributional networks. Members of one group did not sell or distribute drugs to the other. Each was a separate chain conspiracy whose activities paralleled and competed with the other. Indeed, nothing can more clearly demonstrate the competition, if not the dislike, that one group had for the other than an incident described by Barnaba. In September 1971 after Barnaba had defected to the Pugliese group, he had a discussion with Butch Pugliese. Pugliese told Barnaba that Inglese, apparently in short supply, had asked him to get drugs for Inglese from Papa on consignment. Pugliese refused, noting with some satisfaction that "GiGi (Inglese) was drowning" (1456). The refusal to help a drowning man hardly indicates cooperation; instead, it clearly points out that the existence of Inglese's group did not serve the interests of Pugliese's.

Moreover, it was clear that the group did not have a common source of supply. While the government could argue from the evidence that Vincent Papa was the Pugliese group's source, no evidence existed that Papa was supplying the Inglese group. Had he been, there would have been no need for Inglese to approach Pugliese with such a request and Christiano and Inglese would not have been so disparaging of Toutoian's announcement of his intention to see Papa (1372). Furthermore, the disparity in quality and price between Inglese's narcotics and the narcotics purchased by Barnaba from Lessa, which allegedly came from Papa, during a time when Barnaba was dealing with Inglese, would

indicate that Inglese's source could not be Papa.

Furthermore, John Barnaba was not a link between the groups. He never transacted business with both groups during the same period. Even if Lessa, by some imaginative extrapolation of the record, could be said to be a member of the Pugliese group, the Papa narcotics which Barnaba obtained from Lessa never went to Inglese; rather, they went to Richard Forbrick and resulted in Delvecchio's warning to Barnaba not to do business with anyone but him and Inglese.

Angelo Mamone also does not serve as a link serving the interests of both groups. His presence in the Beach Rose Social Club and his one-time assistance in counting money with Inglese does not show that Mamone represented a connection between the two groups, even if the hearsay allegation that Mamone was Pugliese's partner were true.

Neither does Mamone's alleged assumption of Barnaba's debt to one of Barnaba's customers provide evidence of a connection between the two groups in furtherance of an overall conspiracy. The statement by Mamone that Barnaba's customer, Burke, was also a customer of Mamone's who owed Mamone twenty-five or thirty thousand dollars and that therefore Mamone would voluntarily subtract Barnaba's debt to Burke from Burke's debts to Mamone and that Barnaba would then owe Mamone instead, is, if anything, inconsistent with any claim of cooperative conspirators.

Assuming Mamone to be Pugliese's partner, Mamone's gesture shows that he was trying to keep his own customers from becoming involved with Inglese's people.

Thus, Mamone does not represent a link between groups. He is simply present in the club on a frequent basis and whatever business he may be engaged in is left to speculation.

Additionally, Vincent Papa's presence in or around the Beach Rose Social Club, as testified to by Detective DeMarco in identifying a photograph, is not probative evidence of a link to the Pugliese group, especially in light of Inglese's and Christiano's colloquy regarding the attempt of Toutoin to secure narcotics from Papa.

Finally, absolutely no connection to any member of the Inglese group was ever made to the million dollars or to Joseph DiNapoli. Certainly the fact that Vincent DiNapoli accompanied Carmine Tramunti and Frank Stassi to the Tear Drops Bonsoir one night is not probative in that regard whatsoever.

Thus, there was no alliance between the groups in quest of common interests; there was only competition between them. The fact that both groups were in the same business is a wholly insufficient basis for claiming a single conspiracy. Kotteakos v. United States, 328 U.S. 750, supra.

II.

Since it is clear that a variance exists between the indictment and the evidence, two independent conspiracies having been proved instead of the one charged, the inquiry proceeds to

whether the variance is material -- that is, whether it affects the substantial rights of the accused. Berger v. United States, 295 U.S. 78, 82 (1935); United States v. Agueci, 310 F.2d 817, 827 (2d Cir. 1962).

In United States v. Berger, 73 F.2d 278, 280 (2d Cir. 1934), reversed on other grounds, 295 U.S. 78, supra, this Court discussed what would affect substantial rights sufficiently to make the variance material and require reversal. Specifically, the Court wrote that the variance would be material where surprise hampers the presentation of the defense or where, as in the present case, "it will allow the production of evidence not competent or material to the crime he has committed."

The staggering amount of evidence relating to the DiNapoli-Pugliese group could not but harm Inglese, Christiano and Ceriale in a material way. The million dollars alone is a sufficient example of the prejudice the appellants suffered by being joined in a single conspiracy count with the principals of an independent group.

Thus, because the evidence established multiple conspiracies, the government failed to prove the single conspiracy alleged in the indictment. The judgment should therefore be reversed, the conspiracy count dismissed, and a new trial ordered on the substantive counts.

POINT IV.

THE CHARGE OF THE COURT ON MULTIPLE
CONSPIRACIES WAS ERRONEOUS, CONFUSED
AND ALMOST INCOMPREHENSIBLE. A NEW
TRIAL IS THUS REQUIRED

Since a serious multiple conspiracy issue was clearly presented by the proof, counsel requested the court to charge that if multiple conspiracies had been proven, then the government has failed to prove the single conspiracy alleged in the indictment and the defendants must be acquitted. (See, e.g., requests to charge 8 and 9 of defendant Christiano). Such a charge would have been correct. Indeed, in United States v. Calabro, 449 F.2d 885 (2d Cir. 1971) this Court stated flatly that it is the "better practice to instruct the jury that they must acquit if they find multiple conspiracies when only one conspiracy is charged." (449 F.2d at 894). Similar instructions have been often given by the trial courts and approved by this Court in many cases. E.g., United States v. Borelli, 336 F.2d 376, 382 (2d Cir. 1964); United States v. Gugliaro, ___ F.2d ___ (2d Cir. July 19, 1974), slip op. 4877 at 4882-3, n. 4; see also, United States v. Lopez, 420 F.2d 313, 317 (2d Cir. 1969); see also, the charge of Judge Pollack in United States v. Sperling, 73 Cr. 441, Tr. 2133, which the government supports as correct in its brief on appeal in 73-2363, govt's brief, p. 60). Strangely, the court below did not adhere to the "better practice" announced in Calabro. Rather, it gave a curious and confused instruction which failed to inform the jury of the proper legal standard and which, in reality, charged the multiple conspiracy issue right out of the case. The court charged:

"There is one more thing that I must say to you before we leave the law of the conspiracy charge.

"Some of the defendants have contended that the government's proof fails to show the existence of the one, overall conspiracy which this indictment charges. They argue that no conspiracy existed, or if in fact one did exist, then at best the evidence shows several separate and independent conspiracies involving various groups of defendants.

"Proof of several separate conspiracies is not proof of the single, overall conspiracy charged in the indictment unless one of the several conspiracies which is proved is the single conspiracy which the indictment charges. What you must do is determine whether the conspiracy charged in the indictment existed between two or more conspirators. If you find that no such conspiracy existed, then you must acquit. However, if you are satisfied that such a conspiracy existed, you must determine who were the members of that conspiracy.

"If you find that a particular defendant is a member of another conspiracy, not the one charged in the indictment, then you must acquit that defendant. In other words, to find a defendant guilty you must find that he was a member of the conspiracy charged in the indictment and not some other conspiracy." (5194-5)

Exception was appropriately taken to the court's instruction with the suggestion that the "jury be charged that if more than one conspiracy has been proved they must acquit" (5330-2).

The court's charge that "proof of several separate conspiracies is not proof of the single, overall conspiracy charged in the indictment unless one of the several conspiracies which is proved is the single conspiracy which the indictment charges" (5194) is not only wrong, but is, to say the least, about as contradictory and confusing a way of putting a multiple conspiracy charge as possible. In the first place, the real issue is whether the single conspiracy charged in the indictment is really

one or more conspiracies. If the jury finds there are more than one, they must acquit. Under the court's instruction, the jury can find multiple conspiracies and still convict. That is not the law. United States v. Calabro, supra. In fact, the clause added by the judge, "unless one of the several conspiracies which is proved is the single conspiracy which the indictment charges" makes no sense at all. There are either multiple conspiracies or one conspiracy; if there are more than one, then obviously there cannot be only one.

Moreover, it is something of a mystery as to what the judge was referring when he added that the jury must acquit if it finds a defendant was "a member of another conspiracy, not the one charged in the indictment" (5195). Perhaps he was telling the jury that if, for instance, they found the Tramunti-Inglese group was one conspiracy, and the DiNapoli-Pugliese group was another separate conspiracy, then they could convict whichever of the two was the one charged in the indictment, and acquit the members of the one not charged in the indictment. There are two obvious difficulties with this approach. The first is that it is a misstatement of law, since if two conspiracies are found all the defendants must be acquitted under Calabro because the government has failed to prove the conspiracy alleged. Secondly, the indictment covers the acts of both conspiracies and both are charged in the indictment, although they are charged as one. There would simply be no way for the jury to decide which of the two was the single conspiracy the indictment really meant. The jury was thus completely misled

by the erroneous, confused and involuted manner of treating the serious multiple conspiracy issue presented by the facts of the case. As stated in Bollenbach v. United States, 326 U.S. 607, 612 (1946) "discharge of the jury's responsibility for drawing appropriate conclusions from the testimony depended on discharge of the judge's responsibility to give the jury the required guidance by a lucid statement of the relevant legal criteria." The jury here could not even begin to grapple with the issue of whether there were multiple conspiracies and, if so, how to treat them, under the charge given by the court, since the instruction was barely comprehensible, and even if comprehended, it was wrong. The charge simply bore no relation to what this Court in United States v. Clark, 475 F.2d 240, 248 (2d Cir. 1973) said is required:

"If justice is to be done in accordance with the rule of law, it is of paramount importance that the court's instructions be clear, accurate, complete and comprehensible. . . . "

The charge on multiple conspiracies given below was, by any fair estimate, neither clear, accurate, complete nor comprehensible. A new trial is therefore required, where the factual question involving guilt or innocence on the conspiracy charge is properly submitted.

POINT V.

THE REFUSAL OF THE COURT BELOW TO EXAMINE
THE PROSECUTOR'S NOTES RELATING TO THE
TESTIMONY OF THE WITNESS BARNABA IN ORDER
TO DETERMINE WHETHER THEY SHOULD BE DIS-
CLOSED REQUIRES REVERSAL

John Barnaba testified for the government in an effort to assist himself with regard to a disposition or lower sentence on charges he was facing in the State of New York for conspiring to sell narcotics. He was charged in the state indictment with an A felony, punishable by a life sentence under New York's narcotic laws. He had been arrested in November 1972 and brought to the office of Frank Rogers, the Special Narcotics Prosecutor for New York City. Eventually he was convinced to cooperate and this cooperation led to the arrest of Frank Stassi whom Barnaba had set up in a sale to undercover agent Albert Cassella, a/k/a "Allie Boy."

Throughout the course of their cross-examination both Barnaba and Stassi asserted that inconsistencies between their trial testimony and prior recorded and written statements they had given to state and federal prosecutors and grand juries were attributable to the fact that they had continually "held back" on the prosecutors (e.g., 1742). They alleged that they deliberately provided only the minimum amount of information necessary to obtain governmental consideration for their cooperation. As men in their late middle ages facing substantial jail sentences in the state courts, they thus possessed a considerable

motive to lie to satisfy what they thought the prosecutors wanted to hear, regardless of truth. They also feared reprisal from those they implicated, either truthfully or falsely, whether they were in jail or out.

During the course of cross-examination defense counsel made substantial use of the transcripts of debriefing tapes made by Rogers' office. However, no recordings of these witnesses' conversations with federal prosecutors were made. Nevertheless, it was elicited from Barnaba on cross-examination that notes of his meetings with former Assistant United States Attorney Walter Phillips, Chief of the Narcotics Section, and United States Attorney Curran had been made and not turned over to defense counsel, even after the end of Barnaba's direct testimony. (1802-3).^{*} See generally, Title 18 U.S.C. §3500.

Upon learning of the existence of the notes, counsel immediately asked for their production. His request was, however, incomprehensibly brushed aside by the judge (1802-3). It is clear that the district court erred in failing to examine the prosecutor's notes with a view towards production. Without making an in camera observation of the notes to determine whether any bar existed to their disclosure under §3500, see United States v. Pacelli, 491 F.2d 1108, 1118 (2d Cir. 1974); United

* The question of whether complete and full disclosure of witnesses' statements had been made by the government was a topic of constant colloquy during the trial.

States v. Covello, 410 F.2d 536, 546 (2d Cir. 1969), the court arbitrarily ruled, "You are not going to get them." This unreasoned ruling flies in the face of Campbell v. United States, 365 U.S. 85 (1961).

Barnaba's recitation of the circumstances surrounding the taking of the notes indicates that their substance was such that they might well have met the test laid down by this Court in United States v. Aviles, 315 F.2d 186, 191-192 (2d Cir.), vacated and remanded on other grounds, 375 U.S. 32 (1963), aff'd on remand, 337 F.2d 552 (2d Cir. 1964), cert denied, 380 U.S. 906 (1965). That is,

" . . . a substantially verbatim recital of an oral statement made by the witness to an agent of the Government and recorded contemporaneously with the making of such an oral statement. . . reflect[ing] fully and without distortion what had been said to the government agent. . . . "

Of course, no attorney work product exception to the Jencks Act exists.

"There is no 'work product' exception to the Jencks Act. If a statement taken or recorded by government counsel falls within the definition of the Act, it must be produced."

United States v. Hilbrich, 341 F.2d 555, 557 (7th Cir. 1965)

In the instant case, because the court flatly denied counsel's request for production without first examining the statements, it is now impossible to determine that the notes would not have been of substantial aid to the defense, or, whether they were merely cumulative of the Rogers' tapes.

This Court has held that in some circumstances even an in camera hearing may be insufficient and a voir dire by the court is required. United States v. McKeever, 271 F.2d 669, 674 (2d Cir. 1963). Certainly this was such a case. Barnaba repeatedly admitted that the information he gave had to be dragged out of him.* The prosecution conceded as much in its summation to the jury:

"Now, let's face it. We are willing to face it four-square. Men like Frank Stassi and John Barnaba, they are men who have operated outside the law most of their lives, particularly Barnaba. There is no question about that. They are not the kind of men who volunteer information to law-enforcement agencies, call the police when they are in trouble, freely testify about their activities in narcotics or anything else, and obviously they testified in this case to help themselves. No question about it.

"But can they help themselves by committing perjury? Think about that. They cannot. They can only harm themselves.

"In the beginning, when they were arrested, Stassi and Barnaba -- it's clear, there are no secrets about it -- they attempted to tell the agents, prosecutors, Mr. Rogers' office, the police, as little as possible. Is that unnatural with men like this? Does that surprise you? I submit that it shouldn't.

"They tried to find out 'What do you know, and then I will tell them what they know, but don't tell them any more.' That's the way of that world.

"But as the situation unfolded, when it became clear that this wouldn't work, that they had to come clean and they had to make a full breast of things, they did so, and they did it even then with considerable reluctance. That's the record. That's what is before you." (5039-40)

* The same was true for Stassi and since Barnaba's cooperation led to Stassi's arrest, the notes of Barnaba's revelations to Curran and Phillips may well have provided important impeachment material as to Stassi.

The government itself thus emphasized that the jury could believe that Barnaba and Stassi had made full and complete disclosure and in so doing put that very fact in issue. As one court, relying on McKeever, supra, has observed:

"The Supreme Court has held that when a defendant seeks the production of a statement as defined in the statute, the district court has an affirmative duty to determine whether any such statement exists and is in the possession of the Government and, if so, to order the production of the statement. Because the defendant often does not and cannot know whether any such statement exists, the court must conduct any inquiry which is 'necessary to aid the judge to discharge the responsibility laid upon him to enforce the statute.' Campbell v. United States, 365 U.S. 85, 95, 81 S.Ct. 421, 426, 5 L.Ed.2d 428 (1961); see Palermo v. United States, 360 U.S. 343, 354-55, 79 S.Ct. 1217, 3 L.Ed.2d 1287 (1959). Such an inquiry may involve the interrogation of the witness or of the government agent, or an in camera examination of what is purported to be a statement under the statute. See Bary v. United States, 292 F.2d 53, 56-59, (C.A. 10, 1961); United States v. McKeever, 271 F.2d 669 (C.A. 2, 1959)."

United States v. Saunders, 316 F.2d 346, 349 (D.C. Cir. 1963)

Under the circumstances, it was error for the trial court not to have at least examined the notes to determine their producibility under 18 U.S.C. §3500.

POINT VI.

THE PROSECUTOR'S SUMMATION UNFAIRLY PLACED THE INTEGRITY OF DEFENSE COUNSEL AND PROSECUTOR BEFORE THE JURY. HE ALSO MADE UNFAIR COMMENT ABOUT THE PRESENCE OF THE BROTHER OF DEFENDANT DiNAPOLI IN THE COURT-ROOM, TO THE PREJUDICE OF ALL APPELLANTS

A. Comments Regarding Prosecutorial and Defense Counsels' Integrity

From the very outset of his summation, United States Attorney Curran cloaked himself and his aides in the sovereignty of the United States and directly and unambiguously conveyed to the jury that he possessed a personal relationship with them as "your government's representatives." (5029). In contrast, he charged defense counsel with "table pounding . . . a very standard tactic" (5029), and then in closing, charged defense counsel with alleging "a cover up" on the part of the United States Attorney's office (5139).

This sequence of argument unfairly and prejudicially pitted the credibility of government and defense counsel, despite the fact that none of the counsel for the appellants herein had either charged "a cover up" in the manufacturing of any testimony by the government or attacked government counsel's ability, tactics or integrity (5142, 5068), nor called their own credibility into question. Compare, United States v. DeAngelis, 490 F.2d 1004, 1011-1012 (2d Cir. 1974) (Mansfield, J., concurring); United States v. LaSorsa, 480 F.2d 522, 526 (2d Cir. 1973); United States v. Santana, 485 F.2d 365, 370-371 (2d Cir. 1973).

It is submitted that the prosecutor's summation in this regard crossed over the bounds of propriety. Although, as Justice Sutherland observed in Berger v. United States, 295 U.S. 78, 88 (1935), "The United States Attorney is the representative not of an ordinary party to a controversy, but of a sovereignty", this fact gives him no right to use that office as a ground to align himself with the members of the jury as their representative in the criminal justice system.

"Such an appeal to the jury to substitute the power, prestige and integrity of the Government for a neutral determination of the facts [is error]."
United States v. Chrisco, 493 F.2d 232, 237 (3d Cir. 1974)

The prosecutor's assertion that his obligation to his client, the United States, was "an obligation to justice" underscored that appeal to passion. As such, it was clearly prejudicial -- pitting as it did the majesty of the sovereign against the defendants.

B. The Prosecutor Unfairly Commented that the Judge Would Insure that a Government Witness Would Not Commit Perjury

In the course of his summation, Mr. Curran dealt with the credibility of the prosecution's co-conspirator witnesses. In commenting on the motive to lie of the witness Dawson, he stated:

"Dawson was promised -- he was promised something, yes -- he was promised that the government would stand up for him if, and only if, he told the truth, and to assume that Tennessee Dawson can help himself by committing perjury before you in this case is to assume that Judge Duffy, who heard and saw him testify, will reward Tennessee Dawson for lying to convict innocent people." (5049)

This outrageous suggestion that the judge was a surety for the veracity of the prosecution's witness was inexcusable. Furthermore, the judge permitted it to go uncorrected (5050). "No one who is at all conversant with jury trials can fail to see the possible prejudice. . . ." State v. Gunderson, 26 N.D. 294, 297, 144 N.W. 659, 660 (1913).

Although reversed for other errors in the charge and prejudicial comments by the prosecutor, it is to be noted that in United States v. Gonzales, 488 F.2d 833, 836 (2d Cir. 1973), the court, sua sponte, stated:

"This Court has made no promises to this defendant that testified in this case."

In light of Mr. Curran's statement, such a charge should, at the least, have been given as an adjunct to the court's charge on accomplice testimony.

C. The Comment on Vincent DiNapoli's Presence in the Courtroom

In referring to the evening upon which Stassi, Tramunti and Vincent DiNapoli went to the Tear Drops Bonsoir nightclub, which evidence the government asserted showed a relationship between the Tramunti and (Joseph) DiNapoli groups, Mr. Curran stated:

"It has been suggested it didn't happen, they weren't at the Tear Drops. Vincent DiNapoli was there. Vincent DiNapoli came to court. He didn't come to testify up there, no." (5129)

First, no one suggested that the Tear Drops Bonsoir affair did not occur. The only arguments regarding it went to its probative value. It is a distortion of the record to expand more

generally directed cross-examination of Stassi on his credibility and power of recall into an affirmative attempt by the defense to show that the incident never existed. Thus, insofar as the prosecutor's reference to Vincent DiNapoli was prompted by any defense claim that the Bonsoir incident never occurred, it is wholly specious.

It is clear why the government made this reference to Vincent DiNapoli. Its alleged predicate is transparent. The reference to Vincent DiNapoli, at best, was a prejudicial effort to infer that had the meeting not occurred, the defense would undoubtedly have summoned Vincent DiNapoli to so testify and, at worst, it was a sub rosa inference that Vincent DiNapoli was present in the courtroom to put fear into the witness Stassi.

Had Vincent DiNapoli been a defendant, the prosecutor's remark would clearly have required reversal. Griffin v. California, 380 U.S. 609 (1965). However, as the First Circuit has observed:

"Though not obviously a comment upon defendants' failure to take the stand, compare Desmond v. United States, 1 Cir., 1965, 345 F.2d 225, as distinguished from comment upon the absence of other witnesses who might have been called to offer contradiction, see Peeples v. United States, 5 Cir., 1965, 341 F.2d 60, cert. den. 380 U.S. 988, 85 S.Ct. 1362, 14 L.Ed.2d 280, we think such remarks are generally undesirable because the jury is likely to understand them in the former sense. However, the district court acted promptly, sua sponte, to counter any prejudice resulting from counsel's argument. Fleming v. United States, 1 Cir., 1964, 332 F.2d 23."

Kitchell v. United States, 354 F.2d 715, 718-19 (1965)

Here, no instruction was given.

It is well recognized that there is a "presumption attending

[the] failure to offer witnesses within the easy reach of a litigant." Nalls v. United States, 240 F.2d 707, 710 (5th Cir. 1957) (citing cases).

"To proffer the witnesses before the jury under the circumstances here disclosed is to challenge the defendant to use them, or to risk the probability that the jury will hold it against him if he fails to put them on the stand." Id.

The prosecutor's comment in effect was an allusion to facts de hors the record because it necessarily assumed that Vincent DiNapoli had evidence to give. While allusion to extra record evidence is always a serious breach when committed in summation, see United States v. Lefkowitz, 284 F.2d 310, 314-15 (2d Cir. 1960), such an error takes on added importance when the error is based primarily on the testimony of a co-conspirator such as Stassi. United States v. Arendale, 444 F.2d 1260, 1269 (5th Cir. 1971).

Accordingly, the effect of these multiple overreachings by the prosecutor, both singly and severally, requires reversal.

POINT VII.

PURSUANT TO FEDERAL RULES OF APPELLATE
PROCEDURE, RULE 28(i), APPELLANTS INGLESE,
CHRISTIANO AND CERIALE ADOPT BY REFERENCE
THE POINTS AND ARGUMENTS OF ALL CO-APPELLANTS
APPLICABLE TO THEM

CONCLUSION *

THE JUDGMENT BELOW SHOULD BE REVERSED.

Respectfully submitted,

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*

The Court's attention is respectfully directed to the special
Addendum to this brief, post, dealing with the deferred
litigation of electronic surveillance issues.

ADDENDUM

APPELLANTS' RESERVE FOR SUBSEQUENT REVIEW
BY THIS COURT ANY AND ALL CLAIMS OF TAIN
ON THE INSTANT PROSECUTION RESULTING FROM
UNLAWFUL ELECTRONIC SURVEILLANCE

In this case the District Court has left open for further hearings any and all claims of taint on this prosecution which may have resulted from unlawful electronic surveillance.

At the time of the pre-trial conference of January 7, 1974, appellants announced that they wished to attack certain electronic surveillance of them which had been conducted by the government (C20-26, 80-87). A question then arose as to when any electronic surveillance hearing should be held. On January 10, 1974 appellants filed a copious motion requesting a taint hearing and, on January 11, 1974, filed a letter with the Court requesting such hearing to be held pre-trial. See, e.g., United States v. Birrell, 470 F.2d 113, 115 (2d Cir. 1972); United States v. Tortorello, 480 F.2d 764, 785, n. 18 (2d Cir. 1973). Subsequently, the Court determined to defer these hearings until after trial. However, in a letter to the district court dated May 10, 1974, appellants' position regarding wiretapping was reiterated. Since that date, appellants have filed a number of supplemental affidavits with the district court in support of their wiretap claims.

On July 26, 1974 this Court, in the case of United States v. Capra, slip op. 4985, reversed the conspiracy conviction of three of the appellants in that case, Capra, Della Cava and Guarino.

This Court held that wiretapping, conducted by Det. George Eaton and other New York City Special Investigations Unit detectives, of a telephone in Diane's Bar at 2064 Second Avenue, New York City, was unlawful and that subsequent police surveillance and subsequent wiretaps were tainted by the illegal electronic surveillance at Diane's Bar. United States v. Capra, slip. op. at 2999, text and n. 5.

On June 10, 1974 Asst. United States Attorney Thomas Fortuin, in an affidavit submitted to the court below in opposition to defendants' motion for the requested hearing, stated, at ¶13, p. 12:

"The location of the Beach Rose Social Club and the identity of the people was learned from the tap on Diane's Bar."

This statement of Mr. Fortuin is corroborated by both the Capra opinion and the affidavit of Det. Eaton dated January 6, 1972, executed in support of Extension Order No. 11 in the Capra case, which were turned over to counsel for the appellants here (C24). At ¶¶13-20 of that affidavit Det. Eaton described the interception of a telephone conversation to Ray's Stationery Store from Diane's Bar and the resulting surveillance, which, for the first time, revealed to law enforcement agents active in the investigation of this case, the existence of the Beach Rose Social Club. This episode is also described in the Capra opinion at p. 4995:

". . . at 6:30 p.m., December 23, the police overheard 'Beansy' [Della Cava] call Ray's Stationery Store in the Bronx and ask for 'Leo'

or 'Johnny Hooks', 'Hooks' [Capra] answered the telephone and told 'Beansy' to pick up a package. Eaton followed 'Beansy' to a Bronx Social Club where he saw him take a package "

The club in question was, of course, the Beach Rose Social Club.

A March 8, 1972 affidavit of Det. Eaton, an Exhibit (A) to Mr. Fortuin's affidavit of June 10, 1974, at p. 14, alleges that ". . . individuals in the social club use the telephones in the stationery store to conduct conversations dealing with the illegal sale and possession of narcotics."

Numerous conversations of the appellants Inglese and Christiano were overheard over the Ray's Stationery Store tap which was itself instituted as a result of the illegal Diane's Bar tap. Copies of these intercepted conversations have been submitted to the district court. Furthermore, many orders in the Capra case signed after December 23, 1971 were specifically directed at Louis Inglese and visual observations made in conjunction with the procurement of these orders were also made.

Since primary illegality is now judicially established as a result of the decision in Capra, an evidentiary hearing is clearly required in the district court to determine whether the evidence used in this case is the fruit of the poisoned tree. Appellants inform this Court of these facts in order to preserve their appellate rights from any adverse determinations in the unresolved electronic surveillance questions.